IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Frank Jarvis Atwood, Petitioner, v. David Shinn, Respondent.	No. _____ ** CAPITAL CASE** Execution Date: June 8, 2022

PETITION FOR A WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. § 2254

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INTRODUCTION

Mr. Atwood was sentenced to death in 1987, even though the state had proven not a single aggravating factor under Arizona law. Now, he remains under a sentence of death imposed without satisfying the constitutionally necessary requirements Arizona has created to narrow the class of crimes for which a death sentence may be imposed. In other words, he is innocent of the death penalty. These are no mere technicalities; these are the requirements Arizona has painstakingly set up to ensure its use of the ultimate punishment is constitutional. There can be no "close enough" on requirements that bear so much weight. The claim should have been raised sooner, but that does not change the fact that Mr. Atwood is ineligible for a death sentence—a situation the Supreme Court has long recognized calls for federal court intervention, procedural bars notwithstanding. *Sawyer v. Whitley,* 505 U.S. 333 (1992). Executing him would violate the Eighth and Fourteenth Amendments.

But the Court should never have gotten to that point, because Frank Atwood did not kill Vicki Lynn Hoskinson. The specter of a third-party suspect, Annette Fries, has always haunted this case. The case against Mr. Atwood was almost entirely circumstantial, and there was an uncommonly large amount of evidence pointing to Fries. Today, the evidence implicating Fries is impossible to explain in a universe where Frank Atwood committed this crime.

Worse, the state knew it had a third-party-suspect problem with Fries, but when police received a highly credible tip linking Fries to the disappearance, they failed to share that information with Mr. Atwood's attorney, in direct violation of their duties

under *Brady v. Maryland,* 373 U.S. 83 (1963). Now, this Court must intervene to prevent the execution of a man for a crime he did not commit, on a conviction obtained with the State violating the Constitution, in a case that was ineligible for the death penalty.

PARTIES

Petitioner Frank Jarvis Atwood is an inmate of the Arizona Department of Corrections, Rehabilitation, and Reentry under sentence of death.

Despondent David Shinn is the director of the Arizona Department of Corrections, Rehabilitation, and Reentry and an agent of the State that has custody of Mr. Atwood.

JURISDICTION AND VENUE

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 2241(a), and 2254(a). Venue is proper in the United States District Court for the District of Arizona under 28 U.S.C. § 2241(d) because it is the court for the district within which Mr. Atwood was convicted and sentenced.

PROCEDURAL HISTORY

Following a jury trial, Petitioner Frank Jarvis Atwood was found guilty of one count each of kidnapping and first-degree murder. The state sought the death penalty, and just one aggravating factor was found: under former A.R.S. §13-703(F)(1), Mr. Atwood was adjudged to have had a prior foreign conviction bearing a possible sentence punishable in Arizona by life imprisonment or death. Finding no mitigating evidence

sufficient to call for leniency, the court imposed a death sentence in May, 1987.

The Arizona Supreme Court affirmed Mr. Atwood's conviction and sentence. *State v. Atwood*, 171 Ariz. 576 (1992). Thereafter, Mr. Atwood filed a post-conviction petition. The state court denied all claims for relief on January 28, 1997. Mr. Atwood then filed a petition for writ of habeas corpus in United States District Court, pursuant to 28 U.S.C. § 2254. Habeas corpus proceedings were temporarily stayed to allow Mr. Atwood to exhaust certain claims in a successive post-conviction petition in state court, which was denied on January 2, 2009. The District Court thereafter denied Mr. Atwood's habeas petition on January 27, 2014. *Atwood v. Ryan,* 2014 WL 289987 (D. Ariz. Jan. 27, 2014). The Ninth Circuit affirmed. *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017).

Mr. Atwood then filed a pro se successive post-conviction notice and petition in state court on April 23, 2019, raising the issue he seeks to raise here regarding the invalidity of his sole aggravating factor. After the appointment of counsel and filing of an amended petition, the state trial court denied relief on June 22, 2020, finding the claim precluded, and the state supreme court denied review on May 4, 2021. Mr. Atwood filed another successive post-conviction notice on June 25, 2021, seeking to develop and present new evidence regarding the reliability of the sole physical evidence against Mr. Atwood, a paint sample taken from the bumper of his car. After counsel was appointed, a petition was filed on November 19, 2021. The petition was denied without an evidentiary hearing on February 2, 2022.

After securing an expedited briefing schedule from the Arizona Supreme Court based on representations about the timeline for the use of execution drugs as constrained

by the State's obligations under its execution protocol for lethal injection, on April 7, 2022, the State filed a motion for an execution warrant. On May 3, 2022, the Arizona Supreme Court issued the execution warrant, scheduling the execution for June 8, 2022.

STATEMENT OF FACTS

FACTS REGARDING THE EVIDENCE THAT ANNETTE FRIES KILLED VICKI LYNN HOSKINSON AND THE SUPPRESSED EVIDENCE OF THAT FACT

A. The Victim's Disappearance

On September 17, 1984, around 3:30 p.m., eight-year-old Vicki Lynne Hoskinson left her home on Hadley Road in northwest Tucson on her bicycle to place a card in a mailbox at a nearby Circle K store located at Wetmore and Romero, a short distance from her home. RT3/3/1987 at 53. Around 3:50 p.m., after Vicki Lynne had failed to return home, her mother sent her other daughter, Stephanie, to look for her younger sister. Around 4:00 p.m., Stephanie found Vicki Lynne's bike lying in the middle of the street near the intersection of Root and Pocito, a residential area. Exhibit 1, Zobenica Report re: Stephanie Hoskinson (9/19/1984). Vicki Lynne's mother contacted police, who launched a massive search for the missing girl, but Vicki Lynne was not found. As described below, Mr. Atwood was identified as a suspect on September 20; arrested in Kerrille, Texas; and charged with kidnapping. Despite months of searching, however, Vicki Lynne had not been located.

The following March, a major investigative report ran in the Tucson Citizen. The article identified deficiencies in the investigation into Vicki Lynne's disappearance, most notably asking why police had failed to act on substantial evidence indicating that an unrelated woman, and not Mr. Atwood, was responsible for the disappearance. Exhibit 2, Tucson Citizen Article (3/21/1985). Three weeks later, on April 11, 1985, a man searching for his missing dog found human skull in a desert area near the 7300 block of Ina Rd., in the far northwestern outskirts of Tucson. The area was fenced off and at least several minutes' walk from the road. Further searching uncovered additional bones. Exhibit 3 at 1-2, Van Skiver Report re: Bone Discovery (4/12/1985). The Ina Road area where the remains were recovered had been thoroughly searched the previous fall, but that search was unsuccessful. Exhibit 4, Supplement to Search Report (10/29/1984). A comparison of dental records confirmed that the recovered remains were those of Vicki Lynne Hoskinson. No cause of death was ever determined. *State v. Atwood*, 832 P.2d 593, 612 (Ariz. 1992). Mr. Atwood was charged with first degree murder.

B. The Case Against Mr. Atwood

1. Mr. Atwood's Identification and Arrest

Mr. Atwood is a native of Los Angeles, California. In September of 1984, he and a companion, James McDonald, headed east from California in Mr. Atwood's car, a black 1975 Datsun 280Z with California license plates. The back of the car was "completely loaded" with Mr. Atwood's and McDonald's belongings. RT2/11/1987 p.m. at 6, 10, 19. On Friday, September 14, the two men arrived in Tucson, spending the night at the home of some acquaintances. The following day, Mr. Atwood and McDonald left Tucson for

Mount Lemmon, where they camped for two nights. On Monday, September 17, they left Mount Lemmon, returned to Tucson, and headed to De Anza Park near Speedway and Stone, where several of McDonald's acquaintances were congregated. *Id.* 11-12.

Mr. Atwood initially became a suspect in Vicki Lynne's disappearance after a teacher named Sam Hall saw Mr. Atwood and his car around 3:15 p.m. on the afternoon of September 17 in the vicinity of Homer Davis Elementary, just east across Romero Road from where Vicki Lynne's bike was discovered at Root and Pocito. Mr. Atwood was alone in his car when he was observed by Hall, who thought Mr. Atwood was behaving strangely. Finding Mr. Atwood suspicious, Hall recorded his license plate number, which he provided to police. Exhibit 5, Gosting Report re: Hall (9/19/1984). After running the plate number provided by Hall and discovering the car belonged to Mr. Atwood, investigators' attention focused on him, ultimately leading to his arrest in Kerrville, Texas, on September 20.

2. Mr. Atwood's Activities on the Afternoon of September 17

Mr. Atwood never denied being in the vicinity of Homer Davis on the afternoon of September 17, but explained he had gone to that area to try to buy drugs from another party. Specifically, Mr. Atwood testified that on his and McDonald's first night in Tucson on September 14, he used drugs with a person he met in the parking lot of the Wetmore and Romero Circle K, later giving this person a ride to their home in the Flying H Trailer Park, adjacent to Homer Davis Elementary on the northwest side of town. RT5/6/1987 at 120. The following day, he and McDonald left to go camping on Mount Lemmon. Upon returning to Tucson on September 17, he drove to De Anza Park, then Mr. Atwood left

the park to return to the northwest side in an attempt to score drugs again. It was during this trip to the northwest side that he was seen by Sam Hall and other witnesses who placed in the vicinity of the Flying H around 3:00 p.m. Exhibit 5, Gosting Report re: Hall (9/19/1984); Exhibit 6, Clark Report re: Egger (9/20/1984).

Mr. Atwood subsequently returned to De Anza Park, where he met up with McDonald. McDonald told investigators that Mr. Atwood arrived back at the park around 4:00 or 5:00 p.m. RT2/11/1987 at 139. McDonald testified that when he reconnected with Mr. Atwood that afternoon, Mr. Atwood did not seem anxious or nervous. RT2/12/1987 a.m. at 45. Mr. Atwood and McDonald then left the park for the home of Thomas Parisien at 14 West Kelso, approximately two miles from De Anza Park. RT3/10/1987 at 188. Parisien estimated Mr. Atwood and McDonald arrived at his house sometime near 4:00 p.m., as he had been watching *Hawaii Five-0* on television, which aired from 3:00 to 4:00 p.m., and the episode was nearing its conclusion. *Id.* at 188-190.

Richard Murray was a car salesman who worked on North Stone approximately a block away from Parisien's Kelso address. He testified that on the afternoon of September 17, he had occasion to drive down Kelso. Parked on the north side of the street a half block from Stone, the location of Parisien's house, Murray spotted a black Datsun Z car with blue and gold California plates. The car had two occupants, and the person in the driver's seat resembled Mr. Atwood. RT3/11/1987 at 23-27. Approximately 20 to 25 minutes later, Mr. Kelso drove back past the Kelso address. He saw the car again, but could not tell if it was occupied. Both sightings occurred before 5:00 p.m. *Id.* at 28.

Assuming the latest possible time for the second sighting of 5:00 p.m., Murray's testimony placed Mr. Atwood and Parisien's house no later than 4:40 p.m.

After spending the rest of the afternoon in Tucson, Mr. Atwood and McDonald left town headed east towards Texas, where Mr. Atwood was arrested three days later. RT2/11/1987 p.m. at 19-20.

3. The Implausibility of the Prosecution Theory of the Crime

The prosecution's theory of the case was that Mr. Atwood struck the victim's bicycle with his car, placed the victim in his car, drove over the bicycle, drove to the Ina Road location where the victim's remains were later discovered, killed the victim somewhere during this process, and then returned to town, where he met with James McDonald and at De Anza Park. The minimal physical evidence the state proffered to bolster this theory was shoddy, however, and the overall timeline required for the prosecution's theory to hold was implausible if not impossible.

a. Dearth of Compelling Physical Evidence

The physical evidence supporting this theory was scant and contested. Following his arrest in Texas, FBI agents processed Mr. Atwood's car, looking for blood, hair fiber, soil, fingerprint, or any other physical evidence connecting Vicki Lynne to the interior of Mr. Atwood's car or the belongings found inside of it, including clothes and a knife belonging to Mr. Atwood. Evidence collected was sent to the FBI Crime Lab in Washington for examination. RT2/13/1987 at 46-48, 52-59. No such evidence was found. Additionally, while two latent prints were recovered from Vicki Lynne's bicycle, neither matched Mr. Atwood. Exhibit 7, Latent Print Report (12/20/1984).

The lone piece of physical evidence purporting to independently link Mr. Atwood to the missing girl—a smear of pink paint allegedly found on the bumper of his car—was contested and dubious. While the prosecution produced an expert to opine that the pink paint from the bumper matched the victim's bicycle, experts produced by the defendants disagreed with this conclusion. RT3/4/1987 p.m. at 40; RT3/16/1987 at 29-48; RT3/13/1987 p.m. at 79, 81-84, 92-94. Moreover, a smear of blue paint that was on top of—and thus deposited after—the pink paint on the bumper made the State's paint theory even more likely, as it would have required Mr. Atwood to have a second collision with a blue object at the exact same area on his bumper in the roughly 72-hour period between the victim's disappearance and his arrest. RT3/5/1987 p.m. at 47-48.[1]

Another prosecution witness, accident reconstructionist Paul Larmour opined that certain marks on the underside of Mr. Atwood's car were consistent with the car running over the bicycle. That conclusion, however, was informed by the fact that those marks "were in the general vicinity of the paint transfer and contact mark on the front of the car." RT2/24/1987 at 220. Thus, his opinion relied on the dubious assumption that the pink paint on the bumper originated from the bicycle. While Larmour also concluded that the paint on the bumper matched the bicycle, he did not conduct any kind of scientific

[1] During a previous habeas proceeding, counsel raised the possibility that the pink paint had been planted on the bumper, an allegation supported by the absence of any mention of the pink paint from the earliest FBI reports of the car being processed and photos which suggest the bumper was at some point removed from and reattached to the car. This claim was dismissed by the previous judged assigned to this matter, Hon. John Coughenour, following a one-day evidentiary hearing. *See* Atwood v. Ryan, No. CV-98-116-TUC-JCC (D. Ariz.), Order Denying Claim 1-B (9/10/2012).

analysis of the paint. *Id.* at 217. Rather, he based that conclusion on a visual inspection and his experiences working in an auto body shop as a youth. *Id.* at 217-18. For the defense, engineering professor Jack Humphrey disputed Larmour's findings, concluding that Larmour's analysis was flawed and that the marks on the underside of the car were not consistent with the bicycle. RT3/17/87 at 13-42.

Contrary to both Larmour and Corby's conclusions that Vicki Lynne's bicycle was run over by Mr. Atwood's car was the testimony of Clifford McCarter, an accident investigator with the Pima County Sheriff's Department. RT3/16/1987 at 41-42. McCarter testified that on September 17, he examined both the Root and Pocito area and Vicki Lynne's bicycle and concluded there were no signs on the street or on the bicycle itself of an accident between a bike and a car. *Id.* at 43-45. This conclusion was consistent with the testimony of Betty Bodman, one of the first neighbors to notice the bike in the middle of the intersection, who also testified that when she saw the bike, it did not appear damaged. RT2/17/1987 at 116. Another sheriff's deputy who viewed the bike on September 17 echoed this conclusion, testifying that he did not see evidence that the bike had been in an accident. RT3/11/1987 at 35.

b. The Implausibility of the State's Timeline

At Mr. Atwood's trial, Pima County Sheriff's Department Detective Gary Dhaemers testified that he had timed himself retracing the shortest possible route from, roughly, where the bike was found, to where the victim's remains were found, to De Anza Park, concluding that the route would take approximately one hour. RT2/24/1987 at 92-93. Assuming a timeline that is maximally generous to the prosecution's theory—in

which Vicki Lynne was kidnapped immediately after leaving home at 3:30 p.m. and Murray spotted Mr. Atwood just seconds after he arrived at Parisien's at 4:40—is barely credible, leaving just ten minutes to spare. Under a more sober reading, the State's timeline is flat out impossible.

First, we know that Vicki Lynne was not kidnapped as soon as she left her house. She was going to the Circle K to mail a birthday card to a relative in New Mexico. That card was received several days later. RT3/3/1987 at 63. Thus, Vicki Lynne must have gone from her house, to the Circle K, and back to Root and Pocito before being kidnapped, a process that would have taken at the very least several minutes. This fact further narrows the already constrained window for Mr. Atwood to have completed this crime under the prosecution's theory.

Second, Dhaemers calculation was based on a route that terminated at De Anza Park. But Murray spotted Mr. Atwood and McDonald at *Parisien*'s house no later than 4:40 p.m. Mr. Atwood would have had to go to De Anza Park first to pick up McDonald, then head to Parisien's, a couple miles away, adding additional minutes to the minimum time needed to complete the route.

Third, there is no reason to believe that Mr. Atwood would have taken the most efficient route to the necessary destinations on the prosecution's timeline. Mr. Atwood grew up in Los Angeles. Testimony indicated that he was not familiar with Tucson streets and required directions to get around. RT2/17/1987 at 32. The suggestion that an out-of-towner like Mr. Atwood would instinctively be able to plan a complex route from the

northwest side, to the far outskirts to Tucson, and back to just north of downtown in a maximally efficient manner is not plausible.

Fourth, Dhaemers testimony indicated that his timing was based upon him driving from the Romero and Wetmore area roughly to the section of Ina Road near where the remains were discovered, with him then immediately heading back towards town as part of the timing exercise. RT2/24/1987 at 90. The victim's remains were not found on or even near Ina Road, however, but in a desert area surrounded by a fence several minutes' walk from the road itself. Exhibit 3 at 1-2, Van Skiver Report re: Bone Discovery (4/12/1985). Dhaemer's timeline failed to account for the time it would have taken Mr. Atwood to either drive off road or carry the victim to the location where the bones were later recovered. Either would significantly add to the time necessary for Mr. Atwood to complete the crime on the prosecution's theory.

Fifth, route chosen by Dhaemers contradicts the testimony of one of the prosecution's own witnesses. Dhaemers based his calculations on a route that initially went north from the Root and Pocito area. RT2/25/1987 at 92-93. The State, however, called a man named Michael Young, who testified the he saw a man matching Mr. Atwood's description headed *south* in that area between 3:30 and 4:00 p.m. RT2/18/1987 at 14-15.[2] This would be the opposite direction from the Ina Road location, adding still

[2] Young's testimony was itself suspect. For example, witness Michael Young testified that he saw Mr. Atwood's car twice, the second time with a child in the passenger seat. RT2/18/1987 A.M. at 14-20, 77-82. Yet when Young was interviewed by police days after the disappearance, he made no mention of the second sighting of Mr. Atwood or the child he saw in the car, producing those details only seven or eight months later, long

more time necessary to complete the route. Dhaemers admitted that his calculation did not take Young's information into account. RT2/25/1987 at 90.

Finally, the state's timeline fails to take into account the existence of adipocere on the victim's remains. Medical examiner Richard Froede's post-mortem examination found the presence of adipocere on the skeletal remains that were recovered in April 1985. Exhibit 8 at 5, Post-Mortem Report (4/13/1985). Adipocere is a wax-like substance that appears on bones post-mortem through bacterial action when the remains are exposed to the right combination of temperature and humidity. Dr. Froede explained that while adipocere may begin to form within the first few days of death, it typically takes several months of development to become recognizable. RT2/27/1987 at 42-44.

Froede speculated that rainy weather in late September of 1984 might have created conditions hospitable to the formation of adipocere for a body dumped in the desert. RT2/27/1987 at 43. Dr. Kris Sperry, a forensic pathologist experienced with bodies left in desert environments, disagreed with this conclusion. Exhibit 9 at ¶¶1, 3, Sperry Affidavit (8/14/1996). Sperry opined that the weather conditions which prevailed in Tucson from late September through mid-October of 1984 would result in rapid skeletonization of remains. Such skeletonization would prevent the formation of adipocere in a body dumped in the open desert. *Id.* at ¶¶4-5. In order for adipocere to form in a desert environment, remains would need to be buried in a grave of one, probably two feet or more. *Id.* at ¶7. Further, the absence of tooth marks on the remains make it unlikely that

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after Mr. Atwood had been publicly identified as a suspect and arrested. RT5/14/1986 at 114; RT5/15/1986 at 10-11.

body had been buried but later disinterred by scavengers. There was also no evidence of a grave near the location where the bones were discovered. *Id.* at ¶¶8-10. Based on this information, Sperry concluded that the available evidence supported the hypothesis that the victim's remains were buried in a grave for at least two months and later disinterred and scattered by a human actor, and that the theory that the body had been dumped or haphazardly covered in dirt at the Ina Road site was not supported by the evidence. *Id.* at ¶¶12-13.

The presence of adipocere on Vicki Lynne's remains thus demonstrates that her body was buried, rending the prosecution's theory of the case untenable. The State's timeline is, charitably, suspect even without this additional testimony about the condition of the bones. It would be impossible for Mr. Atwood to have not only completed Dhaemers' route while *also* digging a grave and burying a body within the narrow timeframe permissible by the prosecution's theory. Exhibit 10, Luis Garcia Affidavit (8/8/1996) (concluding that it would have taken Mr. Atwood at least two hours to dig a grave at that location).

C. The Original Suspect

Before Sam Hall's tip caused investigators to shift their attention to Mr. Atwood, the primary focus of the investigation was a woman named Annette Fries. Multiple eyewitnesses placed Vicki Lynne in the company of Fries in the hours after her disappearance, and voluminous other evidence pointed to Fries as the likely culprit.

1. Eyewitness Sightings and Fries' Identification

a. The Mall Sightings

Late in the evening of September 17, 1984, a woman named Konnie Koger contacted police with information about the disappearance of Vicki Lynne earlier in the day. She was interviewed by police soon thereafter, beginning at 11:20 p.m. Exhibit 11, Barkman Report re: Koger (9/20/1984). Koger was an employee at Cartoon Junction, a toy store inside Tucson Mall. Earlier that evening, around 7 p.m., while Koger was working, a woman and girl entered the store. Koger noted that the woman held the girl tightly by the hand, as if the woman "was afraid the child would run away," but the girl shied away from the woman's touch. During their time in the store, the girl repeatedly complained that she wanted to go home, at one point telling the woman "you're not going to take me home." The girl was crying and gave Koger the impression she had "been crying for a while." As Koger approached the pair, the girl clung onto Koger's leg and continued to repeat that she wanted to go home. *Id.* at 2-6. Eventually, the woman bought a Garfield doll using cash taken from a white bank envelope.[3] The pair then exited the store. After waiting on two other customers, Koger left the store and observed the woman and girl on the lower level of the mall. The woman spoke briefly with a man, giving Koger the impression they knew each other. The woman then departed, with the girl in tow. *Id.* at 5-7.

[3] In a pretrial interview, Koger specified that the woman paid with a $20 bill taken from a First Interstate Bank Envelope. RT3/9/1987 Koger Excerpt, at 38.

When Koger returned home from work later that night, she watched the late local news on television. The station ran a story about Vicki Lynne's disappearance, including a picture of the missing girl. Koger reported that the girl looked familiar, and after a few minutes' reflection she recognized her as the girl she had seen in Cartoon Junction earlier that evening. At her husband's suggestion, Koger contacted authorities and was interviewed by police later that night. Exhibit 11 at 7, Barkman Report re: Koger (9/20/1984).

When the police arrived, Koger was shown a picture of Vicki Lynne, which she positively identified as the girl she had seen earlier that evening. Exhibit 11 at 2, Barkman Report re: Koger (9/20/1984).[4] When asked what the girl was wearing, Koger stated that she "was dressed patriotic" in a red, white, and blue dress with vertical stripes. *Id.* at 5. Koger's description was consistent with the dress Vicki Lynne was wearing at the time of her disappearance.[5] Investigators subsequently brought a dress for Koger to view that was almost identical to the one Vicki Lynne was wearing but with some slight color variations. Koger said that other than the color variations the dress matched the one worn by the girl she saw earlier that evening. *Id.* at 7-8.

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[4] After being shown a photo of Vicki Lynne at Mr. Atwood's trial, Koger repeated this conclusion, testifying that she was positive that the girl she saw at the mall was Vicki Lynne. RT3/9/1987 Koger Excerpt, at 17-19.

[5] Koger never had the opportunity to see any clothes belonging to Vicki Lynne before she called police, as the photo of the missing girl Koger saw on the evening news only showed her from the neck up. RT3/9/1987 Koger Excerpt, at 18.

During her police interview, Koger also gave a physical description of the woman she observed accompanying the girl, describing her as in her 30s, with dark, dyed hair that was beginning to show at the roots and looked as if it had been permed. The woman was approximately 5'5" and "sturdy," neither skinny nor fat. She noted that the woman wore dangling turquoise earrings, carried a brown leather purse, and was wearing a brown, round brimmed hat made out of a woven material. Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984). She reported the woman had a prominent "Roman" nose, a deep "scruffy" voice, and was carrying a very full shopping back from Mervyn's department store. *Id.* Koger described the woman as dirty, stating she "looked like she needed a bath. *Id.* at 3. Based on the physical description Koger provided, police prepared a composite drawing of the woman seen with Vicki Lynne. *Id.* at 8; Exhibit 12, Composite Drawing of Suspect.

The following day, police canvassed the mall looking for witnesses who had seen Vicki Lynne or the woman in the composite drawing there the previous day. Numerous witnesses said that they had. For example, Teri Pongratz was working in the mall's food court at a restaurant called Hotdog on a Stick on the evening of September 17. Shown the composite drawing and a picture Vicki Lynne, Pongratz reported that she had seen both of them in the mall the previous evening, and that the woman had purchased food from her restaurant. She specifically recalled that "the child was complaining and the woman was being real strange." Exhibit 13 at 3-4, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984). Pongratz remarked that the woman was being "very harsh with the child." *Id.* at 4. A friend of Pongratz, Sylvia Graham, had been with her on the

evening of September 17, and she also recalled seeing the woman and the girl matching the composite and photo. Like Pongratz, Graham also thought the woman was treating the child harshly. *Id.* At Mr. Atwood's trial, after viewing a picture of Vicki Lynne, Graham testified that she was the girl she saw in the food court on September 17. RT3/6/1987 p.m. at 72. Both Pongrtaz and Graham described the woman as being in her 30s with curly brown hair. Exhibit 13 at 4, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984).

Susan Rossi, who worked at La Rocca's pizza in the mall, told an investigating FBI agent that she believed she saw the female suspect and Vicki Lynne on the evening of September 17 as well, around 6:30 p.m. Like Koger, Rossi remembered that the woman had a distinctive, "rough" voice. Exhibit 14 at 2, Doyle Report re: Mall Witnesses (9/18/1984).

Kimberly Hilbert was also working in the mall food court on the evening of September 17. She worked at Burger Express, which was located near Hotdog on a Stick. Exhibit 13 at 2-4, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984). Shown the composite drawing and a picture of Vicki Lynne,

Hilbert was certain that she had seen both of them in the food court the previous evening. *Id.* at 3.[6] She described the woman has having shoulder length brown hair, graying in

[6] The police report states that Hilbert saw the woman and girl "at approx. 1645 to 1700 hrs," i.e. 4:45 to 5:00 p.m. Exhibit 13 at 3, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984). At trial, however, Hilbert testified that the actual time of the sighting was at "about 6:30, quarter to seven." RT3/6/1987 p.m. at 92. In a recent declaration, Hilbert confirmed that the police report misstated the time of her sighting. Exhibit 15 at ¶11, Declaration of Kimberly Ann Sampson (8/27/2021).

front, and that she carried a large brown leather purse and was "pulling the girl along." *Id.* At trial, Hilbert testified that the girl was wearing a red, white, and blue striped dress." RT3/6/1987 p.m. at 94.

Today, Hilbert continues to believe the girl she saw was Vicki Lynne. Exhibit 15 at ¶4, Declaration of Kimberly Ann Sampson (8/27/2021). She states that she saw fear in Vicki Lynne's eyes, recalling that "We made brief eye contact, and I saw in her eyes that she needed help. Even today, it makes my cry to remember what I witnessed." *Id.* at ¶7.

Another mall worker, Mervyn's employee Cindy Cherne, also recognized the composite drawing. Cherne identified the composite as a Mervyn's customer[7] who regularly visited the store twice a week. She said the woman had been in the store on around 2:00 p.m. on September 17. Consistent with Koger's description, she said the woman regularly wore a brown floppy hat and carried a large brown purse. Exhibit 16, Bullock Notes re: Cherne (9/19/1984).

An employee of the Tucson Mall Spencer Gifts, Jesse Jackson, told investigators that around 5:00 or 5:15 p.m. he saw a dirty woman jerking a child down the aisle at his store. Jackson felt that the child, who was crying and screaming, seemed to be fighting the woman and trying to get away. Jackson could not provide a description of the child, but he said the woman resembled the composite sketch. Exhibit 17, Atkins Report Excerpt (9/18/1984). Another Spencer Gift worker, Tina Reidel, told investigators that

[7] Identifying the female suspect as a frequent Mervyn's customer is significant in light of Koger's recollection that the woman she encountered carried a bag from Mervyn's. *See* Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984).

while she did not observe a woman or subject, she did hear a child screaming around the same time Jackson made his observation, leading her to remark "My gosh, what is she doing to that girl." *Id.*

b. Identification of Fries

At 11:00 a.m. on September 18, police interviewed a woman named Rosa Togias, who worked at Valley National Bank. Exhibit 18 at 1, Clark Report (9/20/1984). Togias told police that she recognized the woman in the composite drawing as a bank customer named Annette Fries. *Id.* Comparing the composite drawing with a contemporary picture of Fries, it is not difficult to understand how Togias made that connection, as the similarity is striking:

Compare Exhibit 12, Composite Drawing of Suspect, *with* Exhibit 19, Annette Fries Mugshot.

Togias gave further information about Fries which corresponded with the women observed by Koger. Said that Fries frequently wore dangling earrings. Like Koger, Togias also described Fries' appearance as extremely unkempt. Exhibit 18 at 1, Clark

Report (9/20/1984). Regarding Fries' demeanor, Togias described her as "a mean bitch" who could become verbally abusive without provocation. *Id.* Togias also reported that Fries "hates cops." *Id.*

Police obtained a photograph of Fries, which Togias confirmed was the customer she had talked about. Exhibit 18 at 1, Clark Report (9/20/1984); Exhibit 19, Annette Fries Mugshot. The same photo was shown to the manager of the Circle K at Wetmore and Romero. The manager recognized Fries as customer who frequented the store, made small purchases, and would talk with school children there. *Id.* Earlier that day, the manager of that Circle K, another employee of the store, and a customer all recognized Fries as a woman who had frequented the store in the recent past. Exhibit 20, Excerpt of Cramer Report (9/18/1984).

The same day, the photo of Fries was shown to Koger. Koger told police that the photo resembled the woman she saw the previous night in the mall, specifically noting that the eyes and nose were the same, but felt the hair was not exactly the same. Nonetheless, she concluded that the photo "looks like her." Exhibit 21, Pederson Report re: Koger (3/1/1985). Later that evening, police arranged for Konnie Koger to be driven by Fries' trailer while Fries stood outside. Koger told police "it looks like her." *Id.*

That same day, Fries allowed investigators to look through her trailer at 3152 N. Shawnee Ave., which did not turn up any evidence. Exhibit 18 at 2, Clark Report (9/20/1984). However, at the time, Fries owned at least one other property, at 5722 N. Trisha Ln. *See e.g.* Exhibit 22, Superior Court Clerk Letter (8/20/1982) (letter from court

clerk to Annette Fries addressed to 5722 N. Trisha). There is no indication that property was ever investigated by police.

2. Fries' Police Interview

Detective Gary Dhaemers interviewed Annette Fries at the sheriff's department on the morning of September 19. Exhibit 23, Annette Fries Interview (9/19/1984). Fries told Dhaemers that she spent the morning of September 17 at the home of Sharon Moon, an elderly woman she helped care for. *Id.* at 1-2. Fries told police that she spent the afternoon of September 17 at home, and that one of her boarders, Juan, could verify that fact. *Id.* at 3-4. Police told Fries they had spoken to Juan, who had reported that she was not at home that afternoon, and in fact did not return home until 8 p.m. *Id.* at 8, 12. Fries then changed her story, now saying she was at Moon's in the afternoon. *Id.* at 8.

The interview Dhaemers conducted with Fries' boarder, Juan Flores, is consistent with Dhaemers' account of what Flores said. Exhibit 24, Juan Flores Interview (9/19/1984). Flores, who had lived with Fries for about a month, told Dhaemers that Fries was not at home in the afternoon or evening of September 17. *Id.* at 1. He stated she did not return home until 8:30 or 9:00 in the evening. *Id.* When asked to describe Fries' character, Flores said that she was "eccentric." *Id.* at 2. At Mr. Atwood's trial, Dhaemers would later testify that Flores' story did not support what he had been told by Fries. RT2/24/1987 at 122.

Elsewhere in her interview, Fries told Dhaemers that on the evening of the 17th she stayed with her boyfriend, a man named Jim Bonjour, at the Stagecoach Motel, meeting

him around 11 p.m. Exhibit 23 at 5-7, Annette Fries Interview (9/19/1984). She further described Bonjour as being "very, very affectionate," and as a hard worker *Id.* at 6, 9.

In fact, however, Bonjour wanted nothing to do with Fries. Bonjour was not Fries' boyfriend, but rather only a former boarder at one of her properties. Exhibit 2, Tucson Citizen Article (3/21/1985).[8] For months, Fries had followed Bonjour and appeared at his worksites, insisting that he loved her and should marry her. *Id.* "The harassment spilled over onto his son-in-law, daughter and grandson, whom she would 'pump' for information[.]" *Id.* Fries' harassment was so persistent that on September 14, 1984, Bonjour along with his daughter and son-in-law, Linda and John Rechtin, sought and obtained a restraining order against Fries. Exhibit 25, Bonjour Injunction Petition. The petition seeking the injunction alleged that over a series of days Fries was continually appearing, unwanted, at their home and work to harass Bonjour. It alleged that Fries "can't take no for [an] answer" and that she was calling their pager so frequently that they had to change pager companies because the cost of her calls was too high. *Id.* John Rechtin wrote of Fries in the petition "I really don't know if she would try to do anything else. My son gets very upset when he sees her and so do we… We can't have this any longer something has to be done, we just can't take this any longer." *Id.*

Given the fear Bonjour and his family had of Fries, the notion that just three days later he would invite her to spend the night with him, as Fries claimed, is implausible,

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[8] Bonjour's name is not provided in this exhibit, but the context establishes his identity. The exhibit states that the man Fries considered to be her boyfriend, his daughter, and his son-in-law obtained an order of protection against Fries, as Bonjour, his daughter, and son-in-law did, discussed below.

and indeed this, too, proved to be a lie Fries told to police. Dhaemers testified that after the interview he went to the Stagecoach motel to inquire if Fries had been a guest there on the night of September 17, but no such record could be found. RT2/24/1987 at 122.

Fries also told Dhaemers that on September 17 her son Todd stopped by the house around lunchtime, complaining that "he ate my lunch. That kind of ticked me off." Exhibit 23 at 2, Annette Fries Interview (9/19/1984). Fries gave an address for Todd, but there is no indication police made any efforts to contact him.

3. Fries' Criminal History and Mental Health

Fries' involvement in the Hoskinson case was not her first run in with the legal system. For example, as discussed above, Jim Bonjour and his relatives obtained a restraining order against Fries because of her repeated harassment. Exhibit 25, Bonjour Injunction Petition. Additionally, in 1970, Fries was arrested by Tucson police on a prostitution charge. Exhibit 26, Fries FBI Record.

By far most the most notable of Fries' run-ins with the law came in 1982, when she was charged with three felonies: conspiracy, attempted fraud, and attempted arson. In July of that year, Fries asked a man named Edward Cole if he would burn down a trailer she owned so she could collect insurance money. Cole went to the police with this information the following August. Exhibit 27, Edward Cole Interview (8/24/1982). Cole told police he initially met Fries at the First Interstate Bank at Stone and Speedway. Cole was separated from his wife and formed a quasi-relationship with Fries. They went on one date. Fries soon brought up the idea of burning down the trailer for the insurance money to Cole. She stated that she wanted the money so she could purchase a trailer

owned by someone near the ARASCO Silver Bell copper mine and move it to a different location. *Id.* She offered to pay Cole in sex and "other things" and said she would use the money to take him on a trip to Las Vegas. *Id.*

Fries contacted Cole again after she took out the insurance policy, which is when Cole went to the police. He said he wanted to get her out of his life because she was "hounding me something terrible." Exhibit 27, Edward Cole Interview (8/24/1982). Fries evidently continued harassing Cole even after he went to authorities, as a January 1983 letter from the police to Cole reflects that Fries had somehow obtained his address and sent him a card the previous month. Cole was disturbed enough by this that he wrote a letter to the police asking what her present location was, which the police said was unknown. Exhibit 28, TPD Letter to Cole (1/3/1983).

Based on Cole's information, Fries was arrested and charged with conspiracy, attempted fraud, and attempted arson. Exhibit 29, Indictment. In January 1983, Fries' attorney filed a Rule 11 motion, asking for a competency evaluations of his client. As cause, the motion stated:

> Defendant has come in contact with numerous people in this case, all of whom are of the opinion defendant is mentally ill; counsel for defendant has had several conversations with defendant and is unable to communicate with defendant because her train of thought is such as to indicate her thinking is perhaps psychotic.

Exhibit 30, Rule 11 Motion (1/7/1983). Following numerous continuances and several expert evaluations, the court found Fries not competent to stand trial but potentially restorable, and Fries was ordered committed to Kino Community Hospital for up to 90 days to be treated and evaluated. Exhibit 31, Under Advisement Ruling (10/4/1983)

In August of 1984, Fries' counsel filed a motion to dismiss the case against Fries on the grounds that she was not competent and could not be restored to competency. Exhibit 32, Motion to Dismiss (8/16/1984). In support of the motion, counsel submitted a letter from Donald Garland, Fries' attending psychiatrist at Kino Community Hospital. Exhibit 33, Garland Letter (10/1/1984). Noting that he had treated Fries in November of 1983, Garland wrote:

> Ms. Fries at the time of my evaluation, was best diagnosed as Schizoaffective Disorder, Hypomanic.[9] This is a severe and chronic mental disorder, and it is my opinion that Ms. Fries is unlikely to regain her competence.
>
> I would like to recommend Ms. Fries to outpatient psychotherapy on an ongoing basis with the recommendation that the patient be tried on Navane which she tolerated fairly well back in November of 1983 as well as a trial of Lithium, which the patient at least initially expressed great disinterest in.

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[9] "Current U.S. diagnostic criteria for schizoaffective disorder are complicated, but in essence they require: (1) a one-month period in which the individual has a combination of delusions, hallucinations, disordered thinking, or 'negative' symptoms typical of schizophrenia; (2) the individual must have experienced episodes of affective illness for a substantial portion of the time he or she has been ill; (3) at some point, the individual had delusions or hallucinations for at least two weeks without prominent mood symptoms; (4) the disturbance is not caused by a substance of abuse, a medication, or another medical condition." Douglas Mossman et. al, *Incompetence to Maintain a Divorce Action: When Breaking Up is Odd to Do*, 84 St. John's L. Rev. 117, 151 n.184 (2010). Notably, schizoaffective disorder was one of four mental illnesses deemed sufficiently serious to disqualify a defendant from eligibility for the death penalty under an Ohio statute adopted in 2021. *See* Ohio Rev. Code § 2929.025.

Id. Finding Fries not competent, the Court dismissed the indictment against her without prejudice on November 11, 1984. Exhibit 34, Minute Entry (11/11/1984).

4. Brown Car Sightings

The prosecution relied on reports placing a black Datsun 280Z with blue and gold California plates—that is, a car resembling Mr. Atwood's—in the area of Root and Pocito around the time Vicki Lynne went missing. However, numerous witnesses associated Vicki Lynne's abductor with a *brown* car, not a black one. Annette Fries was known to own and drive a brown Datsun station wagon. Moreover, substantial evidence indicates that Fries likely also drove a brown Datsun 280Z with blue and gold California plates.

a. Annette Fries' Brown Datsun Station Wagon

Annette Fries drove a 1978 brown Datsun 810 station wagon. She was pulled over and ticketed for failure to yield while driving this vehicle on September 11, 1984. The ticket reflected that the car had an Arizona license plate. Exhibit 35, Fries Traffic Ticket. Juan Flores, Fries' boarder at the time, reported that she was driving her brown Datsun station wagon when she left home midday on September 17, 1984. Exhibit 24 at 1, Juan Flores Interview (9/19/1984).

b. Annette Fries and the Brown 280Z

On September 19, 1984, a man named Abraham Rodriguez contacted police to let them know about a suspicious woman he had recently observed. Exhibit 36, Clark Report re: Rodriguez (9/20/1984). Rodriguez was a mail clerk for St. Mary's hospital who

frequently carried cash on his person in connection with his work, and as a matter of habit he was very aware of his surroundings. On September 14, 1984, he noticed a woman on the sidewalk near the First Interstate Bank in downtown Tucson[10] who he believed was watching him. The woman was standing next to a "root beer brown" Datsun 280Z with blue and gold California plates ending in the digits 198, tinted windows, and "spoke-type wheels." The car was very dirty with a scratch on the rear passenger side. He described the woman as approximately 30 years old with brown shoulder length hair and that she was overall "dirty" in appearance. *Id*. He also noted that the woman was wearing a brown woven sunhat with a brim, the exact same kind of hat Konnie Koger described as the suspect she saw at the mall was wearing. *Compare id*. *with* Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984).

Rodriguez further reported that later that same day, around 11 a.m., he observed the same woman with the same car near Howell Elementary School. He stated that the car was "cruising" near the school, and that the woman inside appeared to be watching the school children on the playground. Exhibit 36, Clark Report re: Rodriguez (9/20/1984).

Several other witnesses placed a woman matching Fries' description with a brown Datsun 280Z. For example, Gerrie Cornett worked at a Circle K on E. Tanque Verde Tucson's east side. Exhibit 37, Miranda Report re: Cornett (9/19/1984) On September 18,

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[10] This sighting outside of First Interstate Bank is significant, as Edward Cole, the man Fries propositioned to commit an arson, initially met her at a First Interstate branch. Exhibit 27 at 1, Edward Cole Interview (8/24/1982). Additionally, Konnie Koger reported that the woman she saw at the mall with Vicki Lynne paid for the Garfield doll she purchased with cash taken from a First Interstate envelope. RT3/9/1987 Koger Excerpt, at 38.

1984, Cornett saw the composite drawing made from Koger's description in the newspaper, and she recognized the woman in the drawing as a customer who had visited her store two days prior, which led her to contact the police. She described the woman as approximately 35 years old with a tan complexion, brown hair, and features similar to the ones in the composite drawing. Consistent with Rodriguez's description, Cornett described the woman's car as being a dark brown Datsun 280Z with tinted windows, "fancy wheels," and California plates. *Id.*

Lorenzo Monarrez was the mailman for Vicki Lynne's neighborhood. On September 18, 1984, he told police that around 2 p.m. the previous day, he saw a woman matching the composite drawing at the Wetmore/Romero Circle K. The woman was acting strangely and was driving a large, "root beer brown" car, the same color description for the vehicle that Rodriguez gave. Exhibit 38, Van Skiver Report re: Monarrez (10/15/1984). Thus, Monarrez reported seeing, approximately one hour before Vicki Lynne's disappearance, a woman resembling Annette Fries in a brown car at the Circle K from which Vicki Lynne mailed a letter shortly before she disappeared.

A caller to the information hotline set up for the investigation reported being cut-off in traffic in the area of Ina Rd. and Oracle by a brown 280Z with California plates driven by a woman matching the suspect's description. Two other callers reported seeing a woman matching the composite driving "a brownish tan full size car" in the area of West Massingale. Exhibit 39, Lead Cards re: Brown Car. Another caller, Leon Rivera, called the hotline with information that on September 17 he had seen a brown Datsun 280Z with California license plate 3EA-748 in the area of Wetmore and Romero. Exhibit

40, Hall Report re: Rivera. The plate number Rivera provided was not a valid California license number, as the initial digit should have been a letter rather than a number, and a search of using letters A through Z in place of the initial 3 did not find any plates assigned to a 280Z. *Id.* Notably, however, the final three digits Rivera remembered, 748, are visually similar to the final three digits Abraham Rodriguez reported seeing on Fries' brown Datsun, 198. Exhibit 36, Clark Report re: Rodriguez (9/20/1984).

c. Witnesses Identifying a Brown Car in Connection with the Disappearance

In the aftermath of Vicki Lynne's disappearance, numerous witnesses told investigators that they had seen a suspicious brown car in the area of Root and Pocito on September 17.

Perhaps the only direct witness to Vicki Lynne's abduction was four-year-old Jonathan Atkinson, who lived with his family on Romero Rd. not far from the intersection of Root and Pocito. Shortly after 6:00 p.m. on September 17, a sheriff's deputy canvassing the neighborhood went by the Atkinson home and was told that Jonathan had information to share. Exhibit 41 at 2, Aubry Report (9/18/1984). Jonathan told the deputy that earlier that day he had seen a girl on a bike hit by a car. He described the car as a "race car, brownish-orange in color" and said that it was driven by a woman. *Id.*

Other children in the neighborhood also reported seeing a suspicious brown car shortly before the disappearance. Nine-year-old Chris Beckley and Travis Spencer

decided to walk to Travis' house after school on September 17. Beckley reported that while he and Travis were walking to Travis's house they saw Vicki Lynne being followed by a brown car that was driving "real slow." Exhibit 42 at 3-4, Christopher Beckley Interview. When they came back out of the house 20 minutes later, Vicki and the brown car were both gone. *Id.* at 4. The car was a "lightish-dark" brown and had Arizona license plates and four doors. *Id.* at 4-5, 8. Travis likewise told investigators that he had seen a brown, four-door car driving very slowly by Vicki Lynne. Travis additionally reported that the driver of the car was female. Exhibit 43, FBI Report re: Spencer (9/19/1984).

Another nine-year-old boy, Eric Ziegler, lived in a small apartment complex approximately 100 feet from Root and Pocito. He told investigators that on September 17 around 2:30 p.m. as well as on the previous Thursday, he had encountered a dark brown, medium sized car with tinted windows. Eric said the car drove around him in a suspicious manner. One encounter occurred at a trailer park on Romero Rd., the other at the Wetmore and Romero Circle K. Exhibit 44, Handwritten Notes re: Ziegler.[11]

Members of the community also contacted investigators with information seeming to connect Fries, Vicki Lynne, and a brown car. For example, On September 24, a man

[11] Information about the suspicious car following Eric Ziegler comes from the handwritten notes reflected in the exhibit. Undersigned have been unable to locate what are presumably the remainder of those notes. However, a separate police report that documenting a canvass of the Park-El-Monte apartments at 4213 N. Romero shows that the Zieglers lived in apartment #216, next to the Bondis in #215. Exhibit 69 at 6, Barkman Report re: Apartments (9/20/1984). This is consistent with the information contained in the handwritten notes.

called into the information hotline to report that he had seen an "orangish brown Datsun," and inside was a woman who resembled the composite drawing and a girl who looked like Vicki Lynne. Exhibit 45, Lead Cards re: Car. Another caller phoned in a tip that she had seen a woman resembling the composite wearing a "floppy hat" and driving a brown station wagon with a girl inside around the intersection of La Cholla and Omar, on the northwest side. *Id.*

Other witnesses reported a woman driving a station wagon who acted suspiciously around children on the northwest side around the time Vicki Lynne disappeared. A woman named Nettie Saint, for example, told police that around 2:30 p.m. on September 17, she saw an unknown woman at Acacia Gardens Mobile Home Park[12] who was watching children playing. Saint said the woman seemed nervous and was acting suspicious. When Saint began to approach her, the woman sped away in her vehicle, a brown station wagon. Exhibit 46, Longoria Report re: Saint (9/18/1984). Similarly, a girl named Gail Murphy reported on September 19 that a white man and white woman in a tan station wagon had followed her as she walked home from school earlier that day. Exhibit 47, Brennan Report re: Murphy (9/19/1984).[13]

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[12] The Acacia Gardens are located at 5505 N. Shannon Rd., approximately 3 miles from Root and Pocito.

[13] Murphy's home at 5332 N Royal Palm Dr. was less than a half mile from the Acacia Gardens Mobile Home Park where Saint made a similar sighting two days prior. *See* n.12, *supra*.

5. Other Contemporaneous Kidnap Attempts Linked to Fries

In the days both before and after Vicki Lynne disappeared, numerous other people reported attempts to kidnap children, either by Fries herself or by a woman closely matching her description.

On the evening of September 17, in the first few hours after Vicki Lynne was reported missing, two men approached a sheriff's deputy working near the Root/Pocito location. The men informed the deputy that someone had tried to kidnap their nephew from the laundry room of their nearby Park-El-Monte apartment, 4213 N. Romero. Exhibit 41 at 3, Aubry Report (9/18/1984). That location is approximately 100 feet from the location where the bike was discovered.[14]

The following day, detectives interview the nephew's mother, Charlene Nanez. Exhibit 48, Nanez Interview (9/18/1984). Nanez stated that approximately eight days before, she was doing laundry in the communal laundry room of the Park-El-Monte between 8:00 and 8:30 in the evening. She had her young son, Joseph, with her, and they were alone in the laundry room. *Id*. at 1-2. While Nanez was doing laundry, she said that a "crazy lady" came into the laundry room, picked up Joseph, and began to walk away with him. Nanez had to tear the woman's arms off of Joseph to keep her from walking away with him. *Id*. at 2, 4. When Nanez confronted her, the woman "started screaming that that was her little boy and that her little boy didn't get run over by a police officer, a month before that." *Id*. at 4. Nanez said the woman was "real crazy." *Id*. Nanez described

[14] The Park-El-Monte was also the home of nine-year-old Eric Ziegler, who reported being followed by a suspicious brown car. *See* n.11 and accompanying text, *supra*.

the woman as having a tan complexion with an average build and shoulder length hair, and that she was drunk, with Nanez saying she "could smell that from a mile away." *Id.* a 2-3. She noted that the woman was wearing a turquoise watch. *Id.* at 3.[15]

Nanez reported that she had noticed the woman 20 minutes earlier when she got out of a vehicle and walked across the laundry room, but she had otherwise not seen her before or since. Exhibit 48 at 3-4, Nanez Interview (9/18/1984). Nanez described the vehicle the woman was driving as a "one of the Datsuns, the 910's, the longer ones." *Id.* at 3. As noted above, Fries was known to drive a Datsun 810 station wagon. *See* §(C)(4)(a), *supra*. Nanez stated that she would definitely recognize the woman if she saw her again, but there is no indication police ever showed her the composite drawing, a photo of Fries, or followed up with her in any other way. Exhibit 48 at 6, Nanez Interview (9/18/1984).

Similar kidnapping attempts were reported elsewhere on the northwest side around the time of Vicki Lynne's disappearance. For example, a woman named Sue Stair contacted the 88-Crime hotline with information about a suspicious woman approaching her child. The lead card memorializing her call states: "Approached Monday A.M. by woman matching description – Woman met Ms. Stair @ car and asked to watch her little

[15] Compare this turquoise watch with the turquoise earrings Konnie Koger observed the suspect woman wearing. Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984). In her police interview, Fries told police she liked to wear jewelry that matches if she's "wearing an Indian outfit." Exhibit 23 at 14, Annette Fries Interview (9/19/1984)

boy at @ K-Mart @ Orange Grove/Thornydale." Exhibit 49, Sue Stair Lead Card.[16] On September 20, another woman, Starlene Kalinski, reported that while she was in a Lucky Supermarket at Ina and Thornydale, a woman approached and began talking to her two young children, who she had left in her car. Reportedly, the woman told the children "I want to take you home with me, I have a very nice house." Exhibit 50, Aubry Report re: Kalinski (9/20/1984). She opened the door and began to grab Kalinski's seven-year-old son, but fled after he struck her in the nose. The woman was reported as having dark, curly, shoulder length hair, and was driving a brown car. *Id.*

At least one kidnapping attempt was indisputably linked to Fries. John Rechtin, the son-in-law of the man Fries believed to be her boyfriend (Jim Bonjour), told a reporter that on one occasion, Fries attempted to force Rechtin's mentally disabled son into her car. The boy escaped and ran home. Exhibit 2, Tucson Citizen Article (3/21/1985). Rechtin's son's distress whenever he saw Fries was one of the stated reasons Rechtin and Bonjour sought a restraining order against Fries. Exhibit 25, Bonjour Injunction Petition.

6. Other Witnesses Identifying Fries

Numerous witnesses made positive identifications of Fries, either linking her to the composite drawing based on Koger's description or otherwise identifying her in ways connected to Vicki Lynne's disappearance. For example, as noted above, a manager, other employee, and customer of the Wetmore and Romero Circle K—the location where

[16] The lead card was not dated, but it is reasonable to assume the "Monday A.M." is refers to was the morning of September 17, 1984. That day was a Monday.

Vicki Lynne had mailed a card prior to her disappearance—all recognized the composite drawing as being a customer they had seen at the store recently. Exhibit 20, Excerpt of Cramer Report (9/18/1984). When shown a photograph of Fries, the same manager identified her as a woman who had frequented the store in recent days and regularly talked to children while she was there. Exhibit 18 at 1, Clark Report (9/20/1984).

Police also interviewed a woman named Susan Carlton, a resident of the Flying H trailer park adjacent to Homer Davis Elementary. Carlton reported that although she was legally blind, one of her children had told her that the composite drawing looked like a friend of her child's named Annette. Carlton was told that this Annette was an alcoholic who belonged to the V.I.P. Club and COPE rehab center on Broadway. Exhibit 51, Van Skiver Report re: Flying H (10/24/1984).

Numerous tips phoned into the investigation's information hotline identified the composite drawing as being Annette Fries. For example, one person called in with a tip recorded as "Caller states that picture is Annette Fries," providing a short description and address information for Fries. The identity of the caller was not recorded. Exhibit 52, Lead Cards re: Fries. Another tip called into the hotline by a caller named Juanita Moreno also directed investigators to Annette Fries. The card reflected that Moreno worked with Fries at Skill Center and that Fries "got very upset with people around her." *Id.* Another caller said she recognized the composite drawing as a regular shopper at the K-Mart store on Miracle Mile where she worked, and that the woman was "very weird, even security keeps an eye on her." *Id.* Fries told Detective Dhaemers that she was a K-Mart shopper, and Rosa Togias told investigators that Fries lived "in the area of the K-Mart Store,

Miracle Mile and Flowing Wells." Exhibit 23 at 5, Annette Fries Interview (9/19/1984); Exhibit 18 at 1, Clark Report (9/20/1984). Moreover, the home address Fries supplied Dhaemers, 3152 North Shawnee (spelled phonetically "Charlene" in the transcript) is mere blocks away from 1310 W. Miracle Mile, the former site of a K-Mart store.[17]

Still another caller reported "Ann Fries, answers description of lady in composite." Exhibit 52, Lead Cards re: Fries. The caller was employed by the Motor Vehicle Department and recognized Fries as someone who "Used to sell newspaper subscriptions to people getting licenses. Very strange acting." *Id.* This was echoed by another called, who said the composite drawing was a woman at the Motor Vehicle Department named "Annie Fries" who lived on Trisha Lane. *Id.*

D. Recent Investigation into Annette Fries

Mr. Atwood's current defense team has conducted additional investigation into Annette Fries. That investigation identified several witnesses with information about Fries' erratic, at times criminal conduct, particularly towards children. Additionally, recent investigation has also uncovered information about Annette Fries' son, Todd Fries, which implicates him in the disappearance of Vicki Lynne Hoskinson.

[17] The location is now a Tucson Police Department substation. *See* "Then and Now in Tucson," Tucson.com (9/2/2016), available at https://tucson.com/then-and-now-in-tucson/image_f64470dc-f2ed-11e5-90ff-c3c6b536770e.html (last accessed 5/2/2022).

1. Annette Fries' Pattern of Disturbing Behavior

Witnesses who know Fries well describe her as demonstrating patterns of disturbing, often violent behavior. This pattern includes allegations that Fries sexually abused children.

Fries' grandson, Josh Slagle, first met Annette in 1996, when he was approximately 13-years-old. Previously, Josh did not know the identity of his biological father (Fries' son Todd) or his family. *See* §(D)(2)(b), *infra*. Over the years, Josh spent time around Annette, including periods where he lived at properties owned by her. Exhibit 53 at ¶8, Joshua Slagle Declaration (4/20/2022). During a recent period living at one of Fries' properties, she did not even allow Josh and his girlfriend to live inside the property, instead requiring them to sleep outside on a patio, where they also had to shower. *Id*. at ¶31. Josh describes his grandmother as "selfish and vindictive" and "the living incarnation of Cruella Deville," calling her a "mean person who cares only for herself." *Id*. at ¶27. When someone has upset her, Josh states, "her first reaction is to threaten to call the police on you." *Id*. He recalls several instances of bizarre behavior by Fries' including an incident where she threatened the employees at a phone store that she would have Josh come and beat them up, and other instances when she would walk straight into an occupied rental unit she owned and yell at the tenants. *Id*. at ¶¶27-28. Fries former daughter in law, Julie Lainhart, similarly recalls incidents where Fries would barge directly into the home of her tenants with no regard for their privacy or feelings. Exhibit 54 at ¶57, Julie Ann Lainhart Declaration (7/22/2021).

Fries' strange behavior could also become violent. Josh remembers a recent incident in which he was looking for something in an ice chest that belonged to Fries. For unknown reasons, this enraged Fries, causing her to lunge at and attempt to stab Josh with a pair of scissors, nearly falling down in the process. Exhibit 53 at ¶32, Joshua Slagle Declaration (4/20/2022). Josh's girlfriend, Crystal, was present during this incident, which she recalls as being very dramatic and dangerous to Josh and Fries herself. Exhibit 55 at ¶6, Crystal Blakely Declaration (1/26/2022). Crystal believes that Fries "has serious mental health problems." *Id*. at ¶2.

Disturbingly, Josh has also heard reports of his grandmother molesting children. In the mid-2000s, Josh was dating a woman named Natasha, the mother of his three children whom he would later marry. Exhibit 53 at ¶¶29-30, Joshua Slagle Declaration (4/20/2022).At the time, Natasha was in beauty school, and Fries would come by to have her hair done by Natasha at a discount. One day after Fries had come by, a fellow student pulled Natasha aside and told her Fries had molested her and a sibling when they were small children. *Id*. at ¶30; Exhibit 56 at ¶4, Natasha Hernandez Declaration (4/21/2022). The student told Natasha that Fries was "a horrible person. Don't you know who she is? Stay away from her!" *Id*. Afterwards, Natasha asked that the school never book another appointment for her with Fries. When she told Josh what the student had told her, Josh did not seem surprised, saying that he thought his grandmother was "a weirdo." *Id*. at ¶¶6, 8. Even before learning about this molestation accusation, Natasha and Josh agreed that they never wanted Fries to supervise their children alone. After learning about the

accusation, they became even more on guard and did not want their children around Fries at all. *Id.* at ¶10; Exhibit 53 at ¶30, Joshua Slagle Declaration (4/20/2022).

Fries former daughter-in-law and the mother of one of her grandchildren, Julie Lainhart, observes that "Annette would often dress inappropriately, wearing low-cut blouses and short shorts with her butt hanging out. This was a 50-year-old woman! She sought and attracted the attention of men. She was very flirtatious." Exhibit 54 at ¶57, Julie Ann Lainhart Declaration (7/22/2021). Josh's girlfriend Crystal recalled a recent incident in which Fries' introduced her boyfriend to Fries. Crystal recalled that Fries responded by walking suggestively and inappropriately in front of the man, who was perplexed by her actions. Exhibit 55 at ¶8, Crystal Blakely Declaration (1/26/2022).

After Julie divorced Fries' son Todd, she gained custody of their daughter and moved to Sierra Vista. Julie wanted nothing to do with either of them, but agreed that they could visit their daughter on supervised visits in Sierra Vista. Exhibit 54 at ¶47, Julie Ann Lainhart Declaration (7/22/2021). Annette, however, would often show up unannounced and say she was there to visit her granddaughter. *Id.* at ¶49. On one occasion, when Julie's daughter was in elementary school, she came home and asked why Fries had been in her classroom. Julie inquired at the school and learned that Fries had showed up at the school unannounced and was allowed to sit in her daughter's classroom. Julie's daughter reported that Fries was dressed inappropriately and was disruptive while she was there. *Id.* at ¶51. After this incident, Julie told the school no one but her was to have contact with her daughter, and she told Fries that she could never do that again and that she could no longer show up unannounced. *Id.* Julie never heard from

Fries after that, which surprised her because of Fries' enthusiasm for seeing her daughter. Julie believed fries "surely would have taken [her daughter] as her own." *Id.* at ¶¶51-52.

In general, Julie believes Fries has "serious mental problems" and "would not put anything past her, including kidnapping or murder." Exhibit 54 at ¶6. Julie Ann Lainhart Declaration (7/22/2021). To this day, she remains fearful of and wants nothing to do with either Fries or her son, Julie's ex-husband, Todd. *Id.* at ¶60.

2. Todd Fries

Konnie Koger told police that after Annette Fries and Vicki Lynne left the toy store, she observed them in the lower level of the mall meeting with a white man she appeared to know. Exhibit 11 at 7, Barkman Report re: Koger (9/20/1984). Fries has a son, Todd Fries, who at the time of Vicki Lynne's disappearance was 21 years old and living in Tucson. *See* Exhibit 23 at 2, Annette Fries Interview (9/19/1984). Currently incarcerated, Todd, like his mother, has a substantial history of erratic, criminal, and sexually transgressive behavior. The events which gave rise to Todd's current incarceration bear a striking resemblance to experiences reported by one of the principle witnesses against Annette Fries in the Atwood case, Konnie Koger.

a. Todd's Background

Todd was born in 1963, the son of Annette and her husband, Trevor Burns. Todd's ex-wife, Julie, says that Todd had "a horrible childhood," stating that he was abused by Burns and feared him to the degree that he slept outside in a doghouse to get away. Exhibit 54 at ¶35, Julie Ann Lainhart Declaration (7/22/2021). Annette told Julie that Todd had been the victim of sexual abuse, but never disclosed who the perpetrator was.

Id. Burns, however, had a history of sexual transgressions. Julie recalls that during her marriage to Todd, they took in Burns, who was elderly and ailing. After he had moved in, Julie was told by Burns' daughter that Burns had molested her when she was a child, information that disturbed Julie because she had her own young daughter living at home. *Id.* at ¶40. On another occasion, police came to Lainhart's home and told her that Burns had exposed himself to a disabled teenage girl while both were en route to an adult daycare service on the Handi-Car, a paratransit service. No charges were filed, but Burns was banned from the Handi-Car and the adult daycare. *Id.* at ¶41. Julie recalls that Burns laughed about the incident to both her and the police. *Id.*

Annette and Burns divorced in 1970s. In 1974, Annette married a man named Francis Fries. Exhibit 57, Daily Star Marriage Licenses (2/5/1974). At some point, Todd change his last name from Burns to Fries. In 1979, Annette reported Francis to police for hitting Todd, who told the investigating officer Todd has struck him in the face, neck, and mouth. The cause of the fight was a problem between Todd and Francis's 16-year-old daughter, who lived with them, which prompted Francis to throw Todd out of the house and threaten to kill him. Exhibit 58, Stover Report re: Fries (8/25/1979).

At one point, Todd was enlisted in the Marine Corps. When his then-wife Julie attempted to apply for a VA loan to buy a home she discovered he had been dishonorably discharged. Exhibit 54 at ¶23, Julie Ann Lainhart Declaration (7/22/2021). Julie was told by Todd that the discharge was for smoking marijuana, while Annette told her it was due to a dispute with a superior officer. *Id. See also* Exhibit 59 at ¶14, Tammy Watson Declaration (12/16/2021).

Todd and Annette's relationship was fractious but close. People who knew them both report that they frequently fought and treated one another with disrespect. Exhibit 53 at ¶23, Joshua Slagle Declaration (4/20/2022); Exhibit 54 at ¶¶6-7, Julie Ann Lainhart Declaration (7/22/2021). Despite this disharmony, however, Todd's ex-wife Julie recalls that they "were also absolutely devoted to one another. If either of them needed something, the other would drop everything and immediately come to the aid of the other one." Exhibit 54 at ¶7, Julie Ann Lainhart Declaration (7/22/2021). Julie states that if something "was significant to one of them, they did it with the other," including possible criminal activity, and recalls that Annette would often refuse to answer questions about her or Todd's past. *Id.* at ¶¶6-7. Josh has noticed that Annette and Todd have grown even closer in the years following Todd's arrest and imprisonment. Exhibit 53 at ¶24, Joshua Slagle Declaration (4/20/2022).

People who have known Todd and Annette for years "think[] both of them are crazy." Exhibit 59 at ¶25, Tammy Watson Declaration (12/16/2021). This is an observation of longstanding, as in 1982 one of Annette's tenants made identical observation, that mother and son are both "crazy." Exhibit 60, Fries Lewd Call Reports (1982). Todd's son and Annette's grandson, Josh Slagle, thinks they "are both odd, toxic people who have been negative influences. They are both just very mean people. I consider them to be soulless." Exhibit 53 at ¶8, Joshua Slagle Declaration (4/20/2022). From his interactions with them, Josh believes both Annette and Todd "have serious mental health issues." *Id.*

On September 17, 1984, Todd was 21-years-old, living in Tucson, and in regular contact with Annette. Exhibit 23 at 2, Annette Fries Interview (9/19/1984).

b. Todd Fries' Pattern of Disturbing Behavior

Multiple witnesses who knew Todd Fries as an adult have described him as being narcissistic, violent, sexually transgressive, and vengeful.

Tammy Watson met Todd in 1982, when she was 16 and he was 19. Tammy became pregnant with Todd's child and gave birth to their son, Josh, the following year. Exhibit 59 at ¶1, Tammy Watson Declaration (12/16/2021). Todd did not want Tammy to have the baby, and he "dragged [her] all over Tucson trying to find a place that would provide an abortion," even though Tammy wanted to keep the pregnancy. *Id.* at ¶5. Todd insisted to staff at clinics that Tammy's pregnancy would be terminated, but because she did not want an abortion and lacked her parents' consent, they were turned away. *Id.* at ¶¶5-6. Tammy briefly lived with Annette and Todd after she became pregnant, but following this incident she left and moved back in with her mother. *Id.* at ¶¶4, 7. After these experiences, Tammy did her "best to avoid having anything to do with Todd or Annette Fries again." *Id.* at ¶8. Todd did not pay child support, show an interest in a relationship with Josh, or otherwise provide any help raising his and Tammy's son. *Id.* at ¶10.

Todd and Tammy's son, Josh Slagle, did not know that Todd was his biological father until he was 13 years old. Exhibit 53 at ¶2, Joshua Slagle Declaration (4/20/2022). Todd's wife at the time, Julie Lainhart, had found out about Josh and tried to include him in their family activities. However, as he got to know Todd and spend time around him,

Josh found Todd's behavior to be "very disturbing" and that the time spent with his father "was often dangerous, demeaning, and confusing to me." *Id.* at ¶¶3, 5.

For example, not long after he met Josh, Todd dropped him off alone on Speedway with a sign reading—falsely— "Help, Sister Needs a Transplant" and ordered him to panhandle. After two hours of this, someone contacted the police, who picked Josh up and returned him to his mother, who was furious with Todd. Exhibit 53 at ¶14, Joshua Slagle Declaration (4/20/2022); Exhibit 59 at ¶12, Tammy Watson Declaration (12/16/2021). On other occasions, Todd would pay Josh cash in exchange for committing petty crimes, which Todd referred to as "subsidized income." On one occasion Todd paid Josh to vandalize someone's house, including instructions on how to spray paint swastikas. Exhibit 53 at ¶¶11, 13, Joshua Slagle Declaration (4/20/2022).

On other occasions, Todd would have Josh bare-knuckle box other children who lived in Todd's neighborhood. Exhibit 53 at ¶16, Joshua Slagle Declaration (4/20/2022). Josh recalls that these other kids "were disadvantaged and had nobody in their lives to tell them this was wrong." *Id.* Todd videotaped the fights "and enjoyed watching us kids pound on each other." *Id.* Josh would see Todd intermittently, but he was never a constant presence in his life. He has "tried and hoped over the year to have a positive and cordial relationship with Todd and Annette. But that hasn't occurred," and after getting to know Todd he "was not a good guy." *Id.* at ¶¶ at 6, 34.

In 1987, Todd was living in Sierra Vista, Arizona, when he met a 21-year-old woman named Julie Lainhart. Exhibit 54 at ¶¶8-9, Julie Ann Lainhart Declaration (7/22/2021). Not long after meeting, Julie agreed to accompany Todd on a road trip to

San Diego. Julie recalled that Todd became odd and controlling when the left on the trip, insisting on driving her car, refusing to stop to let her used the restroom, and watching her every move when he finally agreed to stop at a convenience store. He also stripped down to his underwear during the drive, saying he was hot. *Id.* at ¶10. They eventually stopped at the home of a friend of Todd's, where they stopped to spend the night. After Julie took a shower, she discovered that Todd had been watching her as she bathed and had taken her clothes and towel. *Id*. at ¶12. Julie recalls:

> I was naked. The homeowner was not home. Todd took me into a bedroom, threw me on a bed and viciously raped me. I was a virgin. I screamed for him to stop, but he merely laughed. I passed out. When I awoke, the homeowner had returned to the house. I was in a lot of pain. I thought I was dying. I asked Todd to take me to a hospital, but he laughed and said, "It's just sex."

Id. The following day they left for San Diego, where rather than sightsee they spent the week finding customers for Todd's family photography business. Todd raped Julie repeatedly throughout the tip. *Id.* at ¶13. He also maintained tight control over her, keeping her purse and car keys in his possession and never letting her out of his sight, even insisting she keep the door open when using the bathroom. *Id.* at ¶14.

Despite this horrific experience, Julie was young, inexperienced, and confused. She did not realize until later that what Todd had done, kidnapping and raping her, was a crime, and she told no one about what had happened. Exhibit 54 at ¶16, Julie Ann

Lainhart Declaration (7/22/2021). Although she wanted to break away from Todd, he persisted in pursuing her. As the trauma of the California trip faded, Julie agreed to marry Todd, and they wed in 1988. *Id.* They moved back and forth between Tucson and Sierraa Vista before returning to Tucson permanently in 1994, where they moved into a trailer owned by Annette. *Id.* at ¶¶18, 21.

Todd was violent and controlling with Julie during their marriage. Julie recalls that Todd would throw her across the room if she said anything he took offense at. Exhibit 54 at ¶19, Julie Ann Lainhart Declaration (7/22/2021). She recalls one time when they had dinner with friends. On the way home, Todd complained about something she had said at dinner and back handed her across the face, bloodying her nose. When Julie and Todd met up with their friends at their home, the friend were so shocked at what they saw they called the police, who came to the house but did not arrest Todd. *Id.* at ¶22. Another time, Julie recalls Todd throwing a full can of spray paint at her. The can missed, but it struck the side of their house so hard that is broke through the stucco to the chicken wire below. *Id.* at ¶25. When Todd was angry with Julie, he would violently shove her out of bed and make her lie on the floor without blankets. *Id.* at ¶20.

Todd would control Julie by taking the cord to the phone and Julie's shoes with him and disabling her car when he left for work so that she would be "marooned" at home until he returned. Exhibit 54 at ¶26, Julie Ann Lainhart Declaration (7/22/2021).. When he suspected Julie might leave him, he slept outside their bedroom with a loaded shotgun to keep her from doing so. *Id.* at ¶43.

Julie also observed Todd being abusive to others. On one occasion, Todd put a lit firecracker between the toes of a frail, elderly neighbor who was sleeping in his yard. The man woke before the firecracker exploded and the neighbor was not harmed, but Todd "enjoyed being mean to him. Exhibit 54 at ¶24, Julie Ann Lainhart Declaration (7/22/2021). After her eventual divorce from Todd, Julie received three separate calls from women Todd had dated subsequently. One said Todd had tried to kill her by pinning her against a wall with his truck. Another said he fired a gun at her and missed. The third stated Todd threatened to harm the woman's children. None of these calls surprised Julie. *Id*. at ¶45.

Julie recalls one occasion where Todd drove her to an elementary school. Once they arrived, she remained in the car while Todd got out, spoke to a man she had never met, and then watched as the two began to fight one another. Exhibit 54 at ¶37, Julie Ann Lainhart Declaration (7/22/2021). He refused to explain what provoked the fight. Later that evening, Todd left the house without explanation. When he returned late at night, "he was clammy, out of breath and white as a sheet." *Id.* While she never learned what happened, Julie states "I wondered then and I still wonder whether he killed that guy." *Id.*

Life with Todd became "unbearable" and Julie was determined to leave him. Exhibit 54 at ¶43, Julie Ann Lainhart Declaration (7/22/2021). After she finally succeeded in breaking away, moving in with her parents in Sierra Vista, she returned the next day to retrieve belongings she discovered that Todd had already moved a new woman into their house. *Id.* Julie thinks Todd is a "lifelong conman" who "seemed to

have no empathy. He seemed to be addicted to using and hurting others. His behavior was sadistic. I believe he was a narcissist and a sociopath." *Id.* at ¶64.

Both Josh and Julie report Todd's frequent sexual transgressions. In addition to being repeatedly raped by Todd early in their relationship, Julie recalls another incident where Todd offered a ride to the sister of one of their neighbors, who was visiting from out of town. Todd then drove the woman up A Mountain, exposed himself to her, and demanded sex. The woman refused and later told Julie what happened. Exhibit 54 at ¶33, Julie Ann Lainhart Declaration (7/22/2021). Julie suspected that Todd was unfaithful but pretended it was not happening. *Id.* at ¶34.

Josh has similar memories of Todd. Todd bragged to Josh about having a sex tape of one of his girlfriends, and once told Josh he had a similar video of Josh's mother. Exhibit 53 at ¶18, Joshua Slagle Declaration (4/20/2022). Another time, when Josh was in his late teens or early 20s, Todd asked Josh if he could have sex with Josh's girlfriend. *Id.* at ¶19. Josh's ex-wife Natasha recalls Todd as "an extremely vulgar man" who would make extraordinarily sexually profane comments in her presence. Todd once told Josh that Natasha had "nice tits" and said to Josh of her, in her presence, "Imagine all the ways you could fuck that." Exhibit 56 at ¶11, Natasha Hernandez Declaration (4/21/2022). She and Josh wanted neither Annette nor Todd to be anywhere near their children. *Id.* at ¶10.

Josh describes Todd as "the most vindictive person I've ever known" and "an intelligent man but he's also very cunning, methodical and vengeful." Exhibit 53 at ¶¶8, 25, Joshua Slagle Declaration (4/20/2022). Todd's obsession with vengeance is well attested to. For example, Josh recalled one night where Todd drove him to a home and

had him crawl under a car to drain its oil, claiming it was revenge for the owner's failure to fully pay him for the car. *Id.* at ¶12. As explained below, Todd is currently incarcerated on federal charges (and awaiting to serve state charges) based upon an elaborate and terroristic revenge plot carried out against for customer of his business who he felt had wronged him. A search of Todd's home in that case turned up numerous "revenge books," including one titled *The Encyclopedia of Revenge*, which gave instructions on how to exact revenge against those who have wronged you. Exhibit 61 at 9, U.S. v. Fries Transcript Excerpt (10/4/2012).

Todd also had a significant history of cruelty to animals. Julie Lainhart recalls once catching Todd cornering Annette's small dog in a bathroom and spraying it in the face with perfume for his own amusement. Exhibit 54 at ¶29, Julie Ann Lainhart Declaration (7/22/2021). On another occasion, Todd bought a kitten for his and Julie's daughter, but drove home with the kitten loose and in danger in the back of his truck. Later, Julie regularly caught Todd tormenting the kitten by pinning it against the wall as he laughed. *Id.* at ¶30. The incident with the kitten disturbed Julie enough that afterwards she never let Todd take her daughter anywhere alone. *Id.* at ¶38. Josh similarly recalled that "Todd had an obsession with killing birds," and that he hung up bird feeders in his yard just to shoot the bird that came to feed. Exhibit 53 at ¶15, Joshua Slagle Declaration (4/20/2022). Todd bragged to Josh that if his shot merely injured a bird, he would finish it off by blowing it up with an M-80 firecracker. *Id.*

Todd also had a habit of stockpiling dead animal carcasses. Josh recalls that Todd would hang the carcasses of the birds he had shot, mostly woodpeckers, upside down in

his backyard, like "grotesque trophies." Exhibit 53 at ¶15, Joshua Slagle Declaration (4/20/2022). Testimony at Todd's federal trial, discussed below, established that Todd had accumulated road kill, a dead coyote, and other animal carcasses for his use, and a confidential source told investigators that Todd had been "stockpiling" dead animals at his home. *U.S. v. Fries*, 781 F.3d 1137, 1142, 1145 (9th Cir. 2015).

c. Todd's Criminal History

Todd Fries "had no regard of laws." Exhibit 54 at ¶28, Julie Ann Lainhart Declaration (7/22/2021). Todd's history, described above, includes an extensive pattern of criminal behavior, much of which went unprosecuted and unreported to authorities. However, over the years Todd has had several encounters with the criminal justice system, the most recent of which being a spectacular series of crimes that resulted in his current incarceration.

In 1986, Todd pled guilty to theft by control and theft by representation in connection with his theft of a woman's car and use of a stolen credit card. Exhibit 62, Todd Fries Plea (12/23/1986). This conviction resulted in Todd losing his right to own firearms, but Todd continued to own a shotgun and "always had weapons." Exhibit 54 at ¶38, Julie Ann Lainhart Declaration (7/22/2021). On one occasion, he had his then-wife Julie buy a Glock handgun for him in her name because he could not legally make the purchase. *Id.* After their divorce, Julie asked what had become of that gun. Todd denied still having it but refused to tell her where the gun was. *Id.* at ¶46.

In 1993, FBI agents came to Todd and Julie's house and asked Julie if she knew anything about Todd building bombs. Julie said she did not and allowed the agents to

look around the premises. When she asked Todd about it later, he downplayed it and said someone was trying to set him up. Exhibit 54 at ¶3, Julie Ann Lainhart Declaration (7/22/2021). Todd's son Josh, however, recalls that Todd "had a fixation for explosives, and would often talk about building bombs or making Molotov cocktails." Exhibit 53 at ¶15, Joshua Slagle Declaration (4/20/2022). On another occasion, police came by the home to inquire about graffiti and vandalism that had occurred at a nearby construction site. Julie knew Todd was responsible because after the police left, he came into the house "laughing, with spray paint all over his hands." Exhibit 54 at ¶32, Julie Ann Lainhart Declaration (7/22/2021)

Todd's most serious encounter with the criminal justice system to date stemmed from a series of attacks he perpetrated beginning in 2008, which resulted in numerous state and federal charges and convictions. *State v. Fries*, Pima Cty. No. CR-20140556; *U.S. v. Fries*, No. 4:11–cr–01751–CKJ–CRP (D. Ariz).

On November 1, 2008, a married couple, the Levines, returned to their home in Marana to discover the front of their home had been extensively vandalized. Motor oil, paint, feces, and foam packing peanuts were strewn across the driveway leading to the front of their house, and numerous dead animal carcasses were piled near the front door. Swastikas and anti-Semitic graffiti written in German had been painted on their garage door. A wallet containing a woman's driver's license was found at the scene, but investigators confirmed that the license had been stolen several years prior. A latent print later identified as belonging to Todd was located on the wallet. *Fries*, 781 F.3d at 1141-42; Exhibit 63 at 1, *State v. Fries* Presentence Report (6/13/2016).

Following the attack on their home, the Levines moved to another community in the Tucson area. Ten months later, however, on August 2, 2009, they were attacked again. Early that evening, Mr. Levine noticed a chemical smell, saw something burning in his backyard, and felt a burning in his eyes and throat. He tried to escape through the front of his house but discovered that the front and garage doors had been sealed with an adhesive. Deputies responded to the scene and helped evacuate Mr. Levine and his wife. A large cloud of what was later determined to be chlorine gas was emanating from two devices left on the Levines' property. The cloud grew to a size of 1,000 feet long, 100 feet high, and 200 feet deep, and required evacuation of the entire neighborhood. Investigators discovered sexually graphic and gang related graffiti on the scene, as well as numerous dead rabbits and birds. They also found a day planner which contained the driver's license of a woman named Michele Fuentes and a check from Fuentes made out to Karen Levine with a notation "refund customer unhappy." Investigators determined that Fuentes' license had been stolen two years earlier, and a fingerprint belonging to Todd was later found on the day planner. *Fries*, 781 F.3d at 1143-45; Exhibit 63 at 1, *State v. Fries* Presentence Report (6/13/2016).

Three days later, on August 4, 2009, the FBI's Tucson office "received an 'unusual phone call' from 'a male trying to impersonate a female voice.'" The caller identified himself as Michele Fuentes and "stated that he had information concerning the incident at the Levines' residence. The caller stated that Mr. Levine had approached Fuentes in 'a sexual manner,' and Mrs. Levine 'threatened to call Immigration' when Fuentes reported Mr. Levine's conduct to her." *Fries*, 781 F.3d at 1144. The caller stated

that a cousin of Fuentes was responsible for the chlorine attack. *Id.* at 1144-45. The FBI traced the call to a Tucson hospital. A nurse there reported that an unauthorized person had been noticed on the floor where the call was made, and when shown a picture she positively identified that person as Todd. A latent fingerprint collected from the hospital telephone also matched Todd. *Id.*

On May 31, 2010, a woman named Marguerite Brown contacted police to report a large amount of damage to her driveway and vehicle, which had been covered in glue and acid. A year later, on April 28, 2011, Brown again reported vandalism to her property, including motor oil, feces, and dead lizards being strewn on her property. The drivers' license of an unknown woman was also recovered at the scene. Exhibit 63 at 1-2, *State v. Fries* Presentence Report (6/13/2016).

Both Brown and the Levines suspected Todd was responsible for the attacks and vandalism, as both had had arguments with him regarding alleged poor work his power washing company had done on their property. Employees of Todd's later testified that Todd became upset when the Levines cancelled a check they had issued him, and he began to collect motor oil and dead animal carcasses as part of a plot to get revenge against the Levines. Todd later told his employees that he had painted anti-Semitic graffiti to create the impression of a hate crime and left people's IDs at the scene, all in an effort to divert attention from himself. *Fries*, 781 F.3d at 1145; Exhibit 53 at 2, *State v. Fries* Presentence Report (6/13/2016).

The Pima County Sheriff's Office and FBI obtained a search warrant for Todd's residence. Materials were seized during the search linking him with the crimes. Notably,

this included "the bodies of dead animals including woodpeckers that appeared to have been abused." Exhibit 53 at 2, *State v. Fries* Presentence Report (6/13/2016). The search also uncovered numerous "revenge books" giving advice on how to exact revenge on an enemy. One piece of advice they contained was to let time pass before seeking revenge. As the prosecutor in Todd's eventual federal trial explained, "it's right out of the revenge books that he had, the advice to let time pass. There's no better insulation than time. The longer amount of time you let pass before you take your revenge, the more bewildered the target will be." Exhibit 61 at 9, U.S. v. Fries Transcript Excerpt (10/4/2012).

Notably, during the federal proceedings against him, Todd sought to suppress the fruits of this search on the grounds that they were impermissibly stale, as the first incident occurred in 2009 but the search warrant was not sought until 2011. *Fries*, 781 F.3d at 1141. The district court rejected this argument, and the Ninth Circuit affirmed that result on appeal. In rejecting this claim, the Ninth Circuit placed particularly emphasis on the fact that "the alleged *modus operandi* for each of the incidents was nearly identical. In particular, each incident involved the use of motor oil, animal carcasses, and other substances to vandalize the former customers' residences, as well as attempts to divert blame to uninvolved individuals." *Id.* at 1150.

While Todd was being investigated, FBI agents spoke to Julie Lainhart about her ex-husband. When they asked her if she thought Todd was capable of murder, Julie told them "yes." Exhibit 54 at ¶5, Julie Ann Lainhart Declaration (7/22/2021). During this period, Todd called Julie. He told her that he knew where their daughter was living and working, including her work schedule. He then told her "Now would not be a good time

to do anything dumb," which Julie interpreted as a threat not to cooperate with the investigation. *Id.* at ¶59.

Following a trial in state court, Todd was found guilty of 21 felony and misdemeanor offenses—including attempted murder, kidnapping, and other offenses—and was sentenced to a combination of consecutive and concurrent sentences totaling 24.25 years. *State v. Fries*, No. 2 CA–CR 2016–0244, 2017 WL 6547378, *1 ¶5 (Ariz. App. 2017). In federal court, charges against Todd were severed into two separate trials. Following both trials, he was found guilty of multiple counts, including making false statements, use of a chemical weapon, and possession of an unregistered explosive device. *Fries*, 781 F.3d at 1139-40. He is currently serving time on his federal convictions at a federal prison in Texas. When released, he will begin serving time on his consecutive state convictions.

d. Parallels with Konnie Koger's Experiences

The specifics of Todd's crimes are noteworthy in relation to Mr. Atwood's case because of their striking similarities to threats and harassment experienced by a crucial defense witness, Konnie Koger, following her participation in Mr. Atwood's trial. As discussed above, Koger was the toy store worker who reporting seeing Vicki Lynne Hoskinson in company of an unknown woman at the Tucson Mall on the evening of September 17, 1987. Koger positively identified the clothes Vicki Lynne was wearing. She provided police a description of the woman seen with Vicki Lynne, which was used to create the composite suspect drawing that ultimately led to Annette Fries'

identification. Multiple informants independently contacted investigators saying the composite drawing resembled Fries. *See* §(C)(6), *supra*.

Koger's sighting and later testimony was widely publicized, and she began to receive substantial attention from the community. She was well known enough that members of the public began coming to the toy store "and asked for Konnie just so they could say mean things about the little girl or why didn't you take that little girl by the hand, but I didn't know." RT3/9/1987 Koger Excerpt at 11-12. Koger first tried changing her nametag at the store and eventually was forced to stop working there altogether because of the overwhelming attention she was receiving. *Id.* at 12. The day after she testified for the defense at Mr. Atwood's trial, the Tucson Citizen ran a story devoted to her testimony and including a picture of her on the witness stand. Exhibit 64, Tucson Citizen, "Woman, girl seen in store" (3/10/1987). Anyone paying close attention to Mr. Atwood's case would have been aware of Koger and her role in pointing to Annette Fries as an alternate culpability suspect.

In 2019 and again in 2021, defense investigators interviewed Koger regarding her experiences in connection with Mr. Atwood's case. In these interviews, Koger for the first time disclosed that she experienced harassment following Mr. Atwood's trial which parallels the conduct leading to Todd Fries' current incarceration. Specifically, Koger stated that after testifying for the defense in Mr. Atwood's case, an unknown party began harassing her at both her home and the office where she worked. She received anonymous, threatening phone calls at her home, accusing her of trying to set a child molester free. Exhibit 65 at ¶6, Stuart Keating Declaration (4/25/2022). Her family kept

horses on their property where Koger lived on the far west side of Tucson, and on more than one occasion they discovered that an unknown attacker had harmed the horses by slashing them. Most notably, on at least one occasion, she discovered that a dead animal carcass had been left on her car, which she interpreted as a threat. *Id.*; Exhibit 66 at ¶¶4-5, Jeremy Voas Declaration (5/4/2022). In a separate interview, Koger's sister, who lived with her at the time in question, also recalled that Koger had been the target of harassment following her role in the Atwood case. *Id* at ¶2.

Koger reported that the harassment began after her role in the trial and continued in the years that followed. Exhibit 66 at ¶6, Jeremy Voas Declaration (5/4/2022). The harassment caused Koger and her family considerable distress. Koger's father, who she lived with, was sufficiently concerned that he began to wait outside with a gun at night, looking for intruders on the property he shared with Koger. The harassment stopped only after she moved away from Arizona around 1991, and she stated that escaping the harassment was a contributing factor in her decision to make that move. Exhibit 65 at ¶¶6-7, Stuart Keating Declaration (4/25/2022). The investigator who spoke with Koger in 2019 observed Koger's continued anxiety about her safety, noting that she was armed for the duration of the interview, expressed general concerns about her personal safety, and statements reflecting her continued anxiety about the harassment she experienced in the late 1980s and early 1990s. *Id.* at ¶¶3, 8.

The parallels between Koger's experience and the behavior which led to Todd Fries' current incarceration are striking. Both sets of acts involved prolonged series of anonymous harassment unfolding over several years. Most distinctively, both sets of acts

involved the threatening display of dead animal carcasses, with the collection, mutilation, and display of dead animals, conduct identified with Todd even apart from these cases. *See* Exhibit 53 at ¶15, Joshua Slagle Declaration (4/20/2022). Assuming that Todd Fries was behind the harassment of Konnie Koger, his motive—revenge for a perceived wrong, in this case implicating Todd's mother in a murder—is consistent with both his 2008-11 Tucson area crimes, evidence seized from his home documenting his obsession with the art of revenge, and his documented character. *Id*. at at ¶¶8, 25 (discussing Todd's vindictive and vengeful personality). Even the similarity of these incidents is in keeping with Todd's known patterns. *Fries*, 781 F.3d at 1150 (noting the "nearly identical" *modus operandi* of Todd's crimes).

E. The Withheld Memorandum

In the summer of 2021, the Arizona Attorney General's Office allowed Mr. Atwood's counsel to examine its case file. In the course of this review, undersigned identified a document that had not previously been disclosed to Mr. Atwood or any previous defense counsel which implicates Annette and possibly Todd Fries in the disappearance of Vicki Lynne.

The document is a brief, intra-office memorandum sent from FBI Special Agent David Lincoln Small to the Special Agent in Charge, Phoenix. It provides in pertinent part: "At 10:27 a.m., 9/19/84, PXPD advised via their Chase Channel they had received an anonymous phone call from a female who stated that she saw captioned victim [i.e. Vicki Lynne Hoskinson] in a vehicle bearing Arizona license 3AM618." Exhibit 67, FBI Memo re: Anonymous Call. Appended to the memo was a vehicle registration document

corresponding to the cited license plate. It reflected that the license plate was registered to a 1980 Toyota owned by Richard Rhoads of 5742 N. Trisha Ln, Tucson. *Id*. Richard Rhoads was Annette Fries' next door neighbor. Exhibit 68, Memorandum re: Richard Rhoads (4/7/1986).

Undersigned have conducted a thorough review of their complete case file and have been unable locate the Small memorandum or any indication that it was ever disclosed. Unlike many other items in the Attorney General's file, it is not marked as being disclosed. The summer 2021 file review uncovered other memoranda by Small which also did not appear to be disclosed. The nature of those memoranda—intra-office correspondence of the FBI's Phoenix field office—perhaps explains why that separate tranche of investigative documents was overlooked for disclosure. For whatever reason, however, they were unknown to Mr. Atwood's defense team until they were uncovered during the recent file review.

The failure to disclose the Small memorandum had significant consequences for Mr. Atwood's defense. Mr. Atwood's trial counsel was aware of Rhoads, as a defense investigator interviewed him and other neighbors near Fries' Trisha Lane property. Exhibit 68, Memorandum re: Richard Rhoads (4/7/1986). Rhoads told the investigator that Fries was "crazy" and that he would not be surprised if she was involved in Vicki Lynne's disappearance. *Id*. He also stated that Fries brings "really strange looking men" to clean her property, and that he is afraid to home when those men are working next door. *Id*.

But the defense interviewed Rhoads only as a neighbor. They did not know—and had no way of knowing—that an anonymous woman had phoned in a tip directly implicating Rhoads and were thus unable to question him around that subject. By identifying a neighbor of Fries as someone involved in Vicki Lynne's disappearance, the anonymous tip would have constituted a new and distinct reason to believe that Fries had something to do with the crime. It could have provided independent verification of the sightings made by Koger and the other witnesses who saw Fries with Vicki Lynne, making the defense's third party culpability theory significantly more credible. Without the Small memorandum, the defense lacked this powerful corroboration of its theory of the case.

The Small memorandum is also striking because the anonymous female informant calling in a tip casting suspicion onto a third party it describes is similar to the known prior conduct of Todd Fries. As noted above, Todd proactively sought to throw investigators off his tracks by leaving evidence—specifically stolen drivers licenses—of other individuals at the crime scenes. Even more strikingly, following the chlorine gas attack on the Levines, Todd called in a false tip to the FBI, pretending to be a woman. *Fries*, 781 F.3d at 1144-45. Todd possessed a high regard for his ability to outsmart police and get away with crimes. In 2008, when Todd found out his son Josh was trafficking marijuana, rather than counseling him to stop, he mocked him, saying that Josh was sure to get caught, whereas "he was smart enough to get away with something like that[.]" Exhibit 53 at ¶10, Joshua Slagle Declaration (4/20/2022).

Indeed, Todd had a history of making bizarre, anonymous calls even before the Hoskinson case. In 1982, Annette Fries contacted police to report that she had been receiving anonymous, unwanted calls in the wee hours of the morning. The caller would breathe heavily into the phone and whisper things like "hey baby" or call her an "ignorant bitch." Annette suspected the caller was one of her tenants who resides adjacent to her on Trisha Lane. Following up with the investigation, however, police discovered the lewd late night caller was not the tenant, but Todd. The tenant reported that she allowed Todd to use her phone and witnessed him placing the bizarre calls to his own mother. The tenant commented that both Todd and Annette "impress her as being crazy." Exhibit 60, Fries Lewd Call Reports (1982). The Small memorandum lends great new significance to this strange prior incident.

FACTS REGARDING THE INVALID AGGRAVATING FACTOR

In 1974, a California court convicted Frank Atwood under its statute prohibiting lewd and lascivious conduct, Cal. Penal Code § 288.[18] In 1987, an Arizona court convicted him of kidnapping and felony first-degree murder, occurring on September 17, 1984. In seeking the death penalty, the state alleged three aggravating factors, but the court found just one: the 1974 California conviction was an offense "for which under Arizona law a sentence of life imprisonment or death was imposable," A.R.S. 13-703(F)(1) (1984 version). (Exhibit 70, Special Verdict, 5/8/87.) The State's only witness

[18] All references to the lewd/lascivious statutes are to the versions that existed when Mr. Atwood committed the crime, 1974, when, that offense was punishable by five years to life if committed with a person under age 15.

was a fingerprint examiner who testified that Mr. Atwood's fingerprints matched those from the California conviction. (Exhibit 71, RT 3/26/87 at 18-20). In its sentencing pleading, the state quoted California's and Arizona's lewd/lascivious statutes to show that both statutes allowed sentences up to life in prison. (Exhibit 72, State Sentencing Memo at 3-5). No one—not the judge, not the prosecutor and not defense counsel—actually considered each element of the two statutes or recognized the significant differences between the elements.[19] The court found "no mitigating circumstances which are sufficiently substantial to call for leniency," (Exhibit 70, special verdict at 5) and sentenced Mr. Atwood to death for the murder and life imprisonment for the kidnapping. (Exhibit 73, RT 5/8/87 at 25, 28).

Mr. Atwood pursued timely remedies through direct appeal, state post-conviction, and federal habeas corpus, all of which were unsuccessful. While his attorneys challenged the sole aggravator on several grounds—such as the fact that by the time of the capital sentencing proceeding, the Arizona statute no longer provided for a life sentence—they never raised the issue presented here.

[19] Notably, when this Court considered Mr. Atwood's appeal of the denial of his first federal habeas petition, it recited an abridged version of the statute that omitted the crucial additional element. *Atwood v. Ryan,* 870 F.3d 1022, 1043 n.4 (9th Cir. 2017).

CLAIMS FOR RELIEF

CLAIM ONE: WITHOUT A LEGALY VALID AGGRAVATING FACTOR, MR. ATWOOD'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Mr. Atwood's death sentence is unconstitutional because his crime does not fall within the narrower class of murders Arizona has designated as death-eligible, as required by *Furman* and *Gregg*.

In *Furman v. Georgia,* 408 U.S. 238 (1972), the Supreme Court required that a valid death penalty scheme must meaningfully narrow the class of murders for which the death penalty may be imposed. *See also Gregg v. Georgia,* 428 U.S. 153, 196-97 (1976) (approving Georgia's new death penalty scheme because it "narrow[ed] the class of murders subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can be imposed."). Like Georgia, Arizona accomplished that by creating a list of aggravating circumstances, at least one of which must be found before a death sentence is possible; if at least one is found, the court would then proceed to considering any of the aggravating circumstances, and whether any of five statutory mitigating circumstances was "sufficiently substantial to call for leniency." At the time Mr. Atwood was sentenced, nine aggravating factors existed. The trial court found just one: the existence of a prior conviction for an offense "for which under Arizona law a sentence of life imprisonment or death was imposable." A.R.S. § 13-703(F)(1) (1987 version). The problem is that Mr. Atwood's prior conviction, on which his death eligibility was premised, was *not* such a crime. Accordingly, just as in cases where the qualifying prior conviction is vacated, this prior does not satisfy the (F)(1) aggravating

circumstance, and, regardless of the fact that that aggravator was found at trial, it cannot support a death sentence.

1. Under Arizona law, a foreign conviction only satisfies the (F)(1) aggravator if the statutory elements for the statute of conviction would establish eligibility for a life sentence, without reference to the facts of the individual crime.

Statues that give consequences to prior convictions, especially where they might come from other jurisdictions, predictably raise the question of how to determine which foreign convictions qualify. This quandary is familiar in federal courts from the "categorical approach" cases that have repeatedly arisen in recent years under the Armed Career Criminal Act, federal sentencing guidelines, § 237(a) of the Immigration and Nationality Act, and others. *See, e.g., Borden v. United States,* 141 S.Ct. 1817 (2021), *Sessions v. Dimaya,* 138 S.Ct. 1204 (2018), *Johnson v. United States,* 576 U.S. 591 (2015). For many of these statutes, federal courts have adopted a "categorical approach" or "elements test" where the prior conviction suffices only if its elements, on their face, would meet the requirements, and there is no way to violate the underlying statute without also satisfying the requirement. Arizona has adopted the same approach for its (F)(1) aggravating factor.

Long before Mr. Atwood's 1987 sentencing, the Arizona Supreme Court specifically held that the statutory elements approach, in which the evidence underlying the foreign conviction does not matter, applied to (F)(1). First, in *State v. Lee*, 114 Ariz. 101 (1976), the Court prohibited introduction of facts underlying a prior conviction to prove (F)(1), explaining "[t]he proper procedure to establish the prior conviction is for the state to offer

in evidence a certified copy of the conviction… and establish the defendant as the person to whom the document refers." *Id.* 105 (citations omitted).

In *State v. Smith*, the Court again looked only to the elements, not the underlying facts, in deciding a Texas murder with malice conviction supported (F)(1):

> The court below did not err in considering appellant's prior conviction for murder as an offense for which under Arizona law a sentence of life imprisonment was imposable, since murder with malice is as a minimum second degree murder and punishable under [former §13-]453 by imprisonment in the state prison for not less than ten years."[20]

125 Ariz. 412, 417 (1980).

Next, in *State v. Greenawalt*, 128 Ariz. 150 (1981), the Court reaffirmed *Lee* in even clearer language. In *Greenawalt*, the state alleged the (F)(2) aggravator, which required conviction of a felony "involving the use or threat of violence on another person." Greenwalt argued that the court could not consider the underlying facts to determine if his prior crime was violent, but the court rejected the argument as applicable only to the (F)(1)[21]:

> Appellant interprets our decision in [*Lee*] as precluding the sentencing court from receiving any evidence other than certified copies of prior convictions. Appellant errs in his interpretation of our decision in *State v. Lee*, *supra*. There, we were concerned with the introduction of evidence of prior convictions as they related to the first aggravating circumstance, A.R.S. §13-454(E)(1) (now §13-703(F)(1)) … The limitation on proof which was adopted in [*Lee*] has no application to the second aggravating circumstance.

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[20] Arizona's indeterminate sentencing scheme, repealed in 1978, permitted life imprisonment when a statute set no maximum term. *State v. Jordan*, 114 Ariz. 452, 456 (1976), *vacated on other grounds*, 436 U.S. 911, 911-12 (1978).

[21] Two years later, the court clarified that as with the F(1), only the prior conviction's elements can establish the aggravator, but underlying facts may be considered to determine the *weight* that aggravator receives. *State v. Gillies,* 135 Ariz. 500, 511 (1983).

Id. at 171. *Accord State v. Harding*, 141 Ariz. 492, 500 (1984) (affirming (F)(1) based on priors "for which a sentence of life imprisonment or death was imposable in Arizona."); *State v. Bracy*, 145 Ariz. 520, 536 (1985) (same); *State v. Hooper*, 145 Ariz. 538, 550 (1985) (same).

Arizona courts have also consistently applied this analysis in a range of contexts calling for the use of foreign convictions. *See, e.g., State v. Bible*, 175 Ariz. 549, 604 (1993) (error to find (f)(2) satisfied because "neither the use nor the threat of violence was a *necessary* element for sexual assault.") (emphasis original); *State v. Roque*, 213 Ariz. 193, 216 ¶81 (2006), *quoting State v. Henry*, 176 Ariz. 569, 587 (1993) ("statutory definition of the prior crime, not its specific factual basis" used to determine whether foreign conviction established (F)(2)) (internal quotation omitted); *State v. Wilson*, 152 Ariz. 127, 128, 131 (former A.R.S. § 13-604(I)); *State v. Ault,* 157 Ariz. at 518 (former A.R.S. § 13-604(N), "historical felony conviction)); *Cherry v. Araneta*, 203 Ariz. 532, 535 ¶ 11 (App. 2002) (applying test to "violent crime" exempting defendant from mandatory probation); *State v. Kuntz,* 209 Ariz. 276, 279 ¶ 9 (App. 2004) (determining whether new resident must register as sex offender); *State v. Moran,* 232 Ariz. 528, 533-34 ¶¶ 15-16 (App. 2013) (prior conviction element of aggravated DUI under A.R.S. § 28-1383).

Although overlooked in Mr. Atwood's appeal, decided in 1992, the Court continued applying the statutory elements test to (F)(1). *State v. Spencer*, 176 Ariz. 36, 42-43 (1993) (recognizing (F)(1) focuses on "merely the elements of the offense …"); *State v. Murdaugh*, 209 Ariz. 19, 30 ¶54 (2004) (newly recognized right to jury trial on

aggravators inapplicable to (F)(1) "because they involve a legal determination that may be made by a judge, rather than a factual determination required to be made by a jury."). *Accord, State v. Ault,* 157 Ariz. 516, 520 (1988) (statutory elements test presents "purely a legal question . . .").

Arizona's courts have repeatedly recognized that the statutory elements test is not an arbitrary rule, but rather is necessary to satisfy the Arizona and United States Due Process Clauses, Ariz. Const. Art. II, §4, and U.S. Const. Amend. XIV, confirming that the (F)(1) aggravator cannot somehow be excluded from this ubiquitous rule. *Roque*, 213 Ariz. at 216 ¶ 81, *quoting State v. Schaaf*, 169 Ariz. 323, 333-34 (1991) ("To protect 'a criminal defendant's due process rights,' a court 'may not consider other evidence[ ] or bring in witnesses' to establish the offense."); *Atwood*, 171 Ariz. at 654 (trial court "is forbidden on due process grounds from considering the facts underlying a defendant's prior convictions for purposes of establishing [(F)(2)]"); *State v. Hinchey*, 165 Ariz. 432, 437 (1990) ("[C]ourt may consider only evidence of the conviction; allowing other evidence to establish the violence element violates defendant's due process rights."); *Gillies*, 135 Ariz. at 511 ("[Statutory elements] reading of the statute guarantees due process to a criminal defendant."); *Kuntz*, 209 Ariz. at 279 ¶9 (citing due process in rejecting prosecution argument elements test be limited to sentence enhancements). The test ensures capital defendants receive sufficient notice of aggravating evidence and are sentenced based on accurate evidence that is not unduly inflammatory.

In summary, Arizona's courts uniformly apply the statutory elements test whenever a foreign conviction may impose duties or aggravate sentences. Mr. Atwood was and is entitled to the same treatment as every other defendant.

Notably, in this litigation, the State has not actually argued that the statutory elements test does not apply to the (F)(1). Rather, it has painstakingly argued only that the state court should not consider the merits of the claim, and that there was no Arizona Supreme Court opinion explicitly stating the statutory elements test applied to the (F)(1), insisting Mr. Atwood simply "vastly overstate[d] his position's strength." (Exhibit 74, State's PCR Response at 46). This reticence signals the State's recognition there *is* a constitutional problem with a foreign-prior-conviction aggravator that cannot pass the elements test.

Indeed, the State of Arizona has recently taken the position that the statutory elements test is broadly applicable when considering foreign prior convictions, even conceding error and agreeing to a resentencing in the Court of Appeals. In *State v. Mora*, 252 Ariz. 122 (App. 2021), the State took the position that the non-capital sentencing enhancement statute, A.R.S. §§ 13-705, requires that "an out-of-state felony must strictly conform to an Arizona felony for sentencing purposes." (Exhibit 75, State's Supplemental Brief at 6.) The State argued that the use of foreign convictions in various contexts required that the foreign conviction "includes every element that would be required to prove an enumerated Arizona offense," and that a prior opinion specifically stating that in one sentencing context, "its holding was not limited to" that statute. *Id.* at 7-8. Finally, it explicitly conceded there was no "strict conformity" between a Texas statute on "indecency with a child" and an Arizona statute for molestation of a child, explaining,

"[i]f under any scenario it would have been legally possible for the defendant to have been convicted of the foreign offense but not the Arizona offense, then the foreign offense fails the comparative elements test," and the Texas statute applied to contact with any child under 17, where the Arizona law required the victim to be under 15. *Id.* at 12-13. The State recognized that because the requisite contact with a 15 or 16-year-old would violate the Texas but not the Arizona statute, the Texas convictions could not be used for the sentencing enhancement. In its *Mora* briefing, the State was clear, thorough, and explicit, revealing its true position. It seems to have carefully avoided taking a directly contrary position here—an act that would raise serious due process questions.

2. <u>As a matter of law, Mr. Atwood's California conviction indisputably does not qualify as an offense for which under Arizona law a sentence of life imprisonment or death was imposable.</u>

Mr. Atwood's foreign conviction was under California Penal Code § 288, California's version of the "lewd and lascivious conduct" law that in Arizona appeared in A.R.S. § 13-652 (at the time that offense was committed, in 1974). While the two statutes have a lot in common, it is indisputably possible to violate the California statute without violating the Arizona one.

CALIFORNIA -- Penal Code § 288	ARIZONA – A.R.S. § 13-652
Any person who shall willfully and lewdly *commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code* *upon or with the body, or any part*	*A person who willfully* *commits**, in any unnatural manner**, any lewd or lascivious act*

or member thereof, ***of a child under the age of fourteen years,*** *with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child,* *shall be guilty of a felony and shall be imprisoned in the State prison for a term of from one year to life.*	*upon or with the body or any part or member thereof* *of a male or female person,* *with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons,* *is guilty of a felony punishable by imprisonment for not less than one nor more than five years.* *If such person commits the act as described in this section* ***upon or with a child under the age of fifteen years****, such person shall be punished by imprisonment in the state prison for not less than five years nor more than life without the possibility of parole until the minimum sentence has been served.*

As is apparent, the Arizona statute includes a requirement the California statute does not: that the act be committed "in any unnatural manner." That makes sense; the Arizona statute applies to everyone, adults and children alike, albeit with dramatically harsher sentences if the person is a child. Assuming the "unnatural manner" requirement has some meaning (and it does, as explained below), it is possible to violate the California statute without violating the Arizona one. Accordingly, it fails the statutory elements test, and, in creating death eligibility, Mr. Atwood's California conviction cannot stand in for an A.R.S. § 13-652 conviction.

The Arizona Supreme Court has explicitly stated the language imposes an additional requirement: "Under this statute there is the requirement not only that the act be lewd and

lascivious but also that it be done in an 'unnatural manner.'" *State v. Valdez*, 23 Ariz. App. 518, 522 (1975) (rejecting conviction based on defendant "rubbing his penis on the victim's buttocks and splashing water on her vagina" on grounds those acts "were not 'unnatural' . . .). In terms of what, exactly, that restriction entails, "unnatural manner" has only ever been interpreted to extend to fellatio, cunnilingus, or homosexual conduct.[22] That leaves a wide swath of conduct criminalized by California's, but not Arizona's, statute.

The history of §13-652 illuminates the centrality of the "unnatural manner" element. Its precursor, "An Act Prohibiting Unnatural Sexual Relations," was materially identical to §13-652, including the "unnatural manner" element and no age requirement. Laws 1917, §1, Ch. 2; Rev. Code Ariz. §4651 (1928); *State v. Farmer*, 61 Ariz. 266, 268

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[22] *State v. Jerousek*, 121 Ariz. 420, 423 (1979) (cunnilingus); *State v. Pickett*, 121 Ariz. 142, 145 (1978) (fellatio); *State v. Bateman*, 25 Ariz. App. 1, 2-3 (1975) (fellatio) & *State v. Callaway*, 25 Ariz. App. 267, 268 (1975) ("oral intercourse"), *both vacated on other grounds by State v. Bateman*, 113 Ariz. 107 (1976); *State v. Williams*, 111 Ariz. 511, 513 (1975) (fellatio); *State v. King*, 110 Ariz. 36, 38 (1973) (cunnilingus, fellatio); *State v. Taylor*, 109 Ariz. 481, 482 (1973) (fellatio); *State v. Mortimer*, 105 Ariz. 472 (1970) ("masturbation by one adult male upon another adult male …"); *State v. Hill*, 104 Ariz. 238, 238 (1969) (cunnilingus, fellatio); *State v. Zakhar*, 105 Ariz. 31, 31 (1969) (fellatio); *State v. Phillips*, 102 Ariz. 377, 381 (1967) (fellatio); *State v. Howard*, 97 Ariz. 339, 341 (1965) (fellatio, cunnilingus); *State v. Sheldon*, 91 Ariz. 73, 74 (1962) (fellatio); *State v. Thomas*, 79 Ariz. 355, 357 (1955) (cunnilingus); *State ex rel. Jones v. Superior Court*, 78 Ariz. 367, 373-374 (1955) (fellatio); *Faber v. State*, 62 Ariz. 16, 17-18 (1944) (fellatio); *State v. Farmer*, 61 Ariz. 266, 268 (1944) (fellatio, cunnilingus); *Dutzler v. State*, 41 Ariz. 436, 436 (1933) (fellatio); *State v. Bridges*, 123 Ariz. 452, 453 (App. 1979) (fellatio); *State v. Snyder*, 25 Ariz. App. 406, 407 (1976) (fellatio, anal copulation); *State v. Morris*, 26 Ariz. App. 342, 343 (1976) (fellatio); *State v. Baker*, 26 Ariz. App. 255, 256-257 (1976) (fellatio); *State v. Natzke*, 25 Ariz. App. 520, 523 (1976) (cunnilingus); *State v. Smallwood*, 7 Ariz. App. 266, 267 (1968) (fellatio).

(1944). It targeted "acts between same-sex partners." *May v. Ryan,* 245 F. Supp. 3d 1145, 1153 n.3 (D. Ariz. 2017), *rev'd in part on unrelated grounds, May v. Ryan*, 766 Fed. App'x 505 (9th Cir. 2019).

3. The legal invalidity of the sole remaining aggravator requires vacating the death sentence.

Because the only aggravator was not legally valid, the sentence must be vacated. As the Supreme Court has recognized, ineligibility for the death penalty is assessed "under the applicable state law." *Sawyer v. Whitley,* 505 U.S. 333, 336 (1992). The state's statutory aggravating circumstances "play a constitutionally necessary function." *Zant v. Stephens,* 462 U.S. 862, 878 (1983)

In *Zant*, the Supreme Court clearly distinguished the situation where the *sole* aggravator is invalid from those where other aggravators were validly found. *Id.* at 884 ("[A] death sentence supported by at least one valid aggravating factor need not be set aside. . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."); *see also Brown v. Sanders,* 546 U.S. 212 (2006) (in a state that explicitly weighs aggravators and mitigators, finding of invalid aggravators subject to harmless error analysis). In a very recent Ninth Circuit case from Arizona involving an analogous situation—two aggravating circumstances were based on invalid convictions—the Arizona court's and Ninth Circuit's reason for upholding the sentence was that "[t]wo valid aggravating circumstances remain after excluding the two that were based on the invalid convictions." *Hooper v. Shinn,* 985 F.3d

594 (9th Cir. 2021). Obviously, if the narrowing function is constitutionally required, and the mechanism set up for doing that has not been satisfied, the sentence cannot stand.

B. Mr. Atwood's death sentence violates the Eighth and Fourteenth Amendments because even if Arizona law did not require application of a statutory elements test, no evidence whatsoever of the facts of the prior conviction were presented, and the statute of conviction covered conduct that would not produce a life sentence in Arizona, rendering the evidence on the aggravating factor insufficient.

The Eighth and Fourteenth Amendments require sufficient evidence not only to convict, but also to aggravate, something plainly missing here. For convictions, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Accord State v. Portillo*, 182 Ariz. 592, 594 (1995), *quoting In re Winship*, 397 U.S. 358, 364 (1970) ("It is well established that the Due Process Clause protects criminal defendants against conviction 'except upon proof beyond a reasonable doubt' of every element of the crime charged.") (footnote omitted).

The Eighth and Fourteenth Amendments impose the same requirement for capital sentencing aggravators. *Kansas v. Marsh*, 548 U.S. 163, 170 (2006), *quoting Walton v. Arizona*, 497 U.S. 639, 650 (1990) ("So long as a State's method of allocating the burdens of proof does not lessen the State's burden … to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated …").

In *Johnson v. Mississippi,* 486 U.S. 578 (1988), the jury found three aggravating factors, one of which was that the defendant "was previously convicted of a felony involving the use or threat of violence to the person of another," based on a prior assault conviction in another state. The State's only evidence on that aggravator was an authenticated copy of a sentencing order; no evidence about the underlying crime or conduct was presented. 486 U.S. at 581, 585 ("The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct – the document submitted to the jury proved only the facts of conviction and confinement, nothing more."). That aggravating factor was subsequently invalidated as to the defendant, because the prior assault conviction was reversed by the state that had issued it. It thus could not be validly considered in aggravation—which required resentencing even in a case where two other valid aggravating factors had been found and left undisturbed. *Id.* at 586 (recognizing "a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'"). Where the evidence supporting the aggravator consists of only the fact of foreign conviction, and the foreign statute of conviction is broader than the Arizona statute, the evidence is inherently insufficient.

A Mississippi court has recently come to the same conclusion. In *Gillett v. State,* 148 So.3d 260 (Miss. 2014), the jury found, as one of four aggravating factors, that the defendant "had been convicted of a felony involving the use or threat of violence to the person," based on an out-of-state conviction for aggravated escape. The court had

recognized on direct appeal that "not every escape can be considered a crime of violence under the Kansas statute, and the facts surrounding and supporting the Kansas conviction for attempted aggravated escape are unknown," *id.* at 264, which meant the state had not presented sufficient evidence to support the prior-violent-felony aggravator. (The court had then found that error harmless, given the three other aggravators, but that decision was reversed in postconviction proceedings, and resentencing was ordered).

This (F)(1) error renders Mr. Atwood innocent of the death penalty. Permitting his execution would be "so wantonly and so freakishly imposed" as to violate the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), *quoting Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

C. This Court must adjudicate this claim de novo because the state court did not adjudicate it on the merits, and its dismissal on procedural grounds was not an adequate state-law bar.

The state trial court (affirmed without comment by the state supreme court) had two bases for refusing to consider the merits of the claim: first, it was not a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant, and second, that on deciding the direct appeal of the case in 1992, the state supreme court, *sub silentio,* considered and rejected this claim that neither side had presented to it in conducting an independent review of the appropriateness of the death sentence. Neither is an adequate state ground.

In the direct appeal opinion, the Arizona Supreme Court stated, "We have found no mitigating circumstances sufficiently substantial to call for leniency, *and we have found*

no fundamental error. We therefore affirm the trial court's finding of one aggravating circumstance, A.R.S. § 13-703(F)(1) . . ." That was all it said about the aggravator. What the court was doing here was what it called "fundamental error review," something it did, at the time of Mr. Atwood's appeal, in every case (under a statute, A.R.S. § 13-4035, since repealed in 1995, and as the court's practice, *see State v. Mann,* 188 Ariz. 220 (1997) (ending the practice)). If that general review constituted an implied rejection of the merits on every conceivable claim, there would be no such thing as either (1) a claim that was unexhausted upon reaching federal court or (2) state postconviction review, which has never been allowed for a claim already considered on direct appeal. But Arizona, of course, has always taken the position that claims must be actually presented to the state court to be considered adjudicated for either of these purposes. The trial judge's maneuver here was a true innovation—exactly the sort of "infrequent, unexpected, or freakish" application that renders a ground inadequate. *Wells v. Maass,* 28 F.3d 1005, 1010 (9th Cir. 1994).

Nor did the "independent review" the Arizona Supreme Court was obligated to conduct at the time constitute an implicit rejection of the claim on the merits. In the very case the state invoked in state court proceedings to suggest independent review constituted an implicit rejection of claims not raised, this court found 17 constitutional claims were not exhausted. *Roseberry v. Ryan,* 2019 WL 3556931 at *3, *5 (D. Ariz. Aug. 5, 2019). The state did not argue otherwise. If the Arizona Supreme Court's independent review had constituted a consideration and rejection of those claims, they would have been exhausted by virtue of that independent review.

In short, if the rule applied by Arizona here were actually used, no constitutional claim could ever be raised in a case where the Arizona Supreme Court had affirmed the conviction and sentence on direct appeal. But of course, the fact that a court has never accepted an argument that has never been put to it simply cannot establish that it has been resolved on the merits.

Regarding the non-waivable right, the right at issue here is the Eighth Amendment's requirement that a state capital punishment scheme genuinely narrow the class of murders for which a death sentence can be imposed. It is hard to see how that right could be waived at all, let alone without a personal waiver that is knowing, intelligent, and voluntary—is the State free to execute anyone who volunteers for it, no matter what their crimes (or lack thereof)? Giving up appeals in a capital case requires not only a personal waiver, but proceedings to determine the defendant's competency to make such a decision and the voluntariness of the decision, requirements far beyond the waiver simply being a personal one. *See, e.g., Comer v. Stewart,* 215 F.3d 910 (9th Cir. 2000). There is no indication Arizona has ever treated the right to be free from cruel and unusual punishment as waivable. To suddenly do so as grounds for rejecting a federal claim is clearly not adequate.

D. Timeliness

Although 28 U.S.C. § 2244(d)(1) generally provides a 1-year limitations period running from the conclusion of direct review or the claim otherwise becoming available legally or factually, it has an enduring equitable exception: a showing of actual innocence can overcome this bar to avoid a fundamental miscarriage of justice. *McQuiggin v.*

Perkins, 569 U.S. 383, 393 (2013) ("Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations.").

This claim is being presented pursuant to the equitable exception in *Sawyer v. Whitley,* 505 U.S. 333 (1992), which allows filing of otherwise-barred successive petitions demonstrating actual innocence of the death penalty to avoid a fundamental miscarriage of justice. Qualifying for that exception must apply not only to the successive-petition bar, but also to the limitations period, else it would cease to serve its function of preventing serious miscarriages of justice. Thus, if this petition can clear the bar of 28 U.S.C. § 2244(b), as Mr. Atwood has argued in his motion for an order authorizing the district court to consider a second or successive petition, it also clears § 2244(d)(1). Mr. Atwood has made every effort to bring the claim to this court in a timely fashion after exhausting it in state court.

CLAIM TWO: THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE OF THIRD-PARTY CULPABILITY IN VIOLATION OF THE FOURTEENTH AMENDMENT AND BRADY V. MARYLAND.

The State violated its obligation under *Brady v. Maryland,* 373 U.S. 83 (1963), by failing to disclose material exculpatory evidence. The prosecution is obligated by the requirements of due process to disclose material exculpatory evidence on its own initiative, without request. *See Kyles v. Whitley,* 514 U.S. 419, 432-34 (1995); *United States v. Bagley,* 473 U.S. 667, 682 (1985). Evidence is material, and must be disclosed, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles,* 514 U.S. at 433; *Bagley,*

473 U.S. at 682. A "reasonable probability" does not require showing by a preponderance that the outcome would have been different. *See Kyles* at 433-35. Rather, a "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682; *see also Carriger v. Stewart*, 132 F.3d. 463 (9th Cir. 1997) (granting habeas relief on petitioner's claim that the State withheld exculpatory evidence which undermined the credibility of their witness.)

A. The State Withheld an Exculpatory FBI Report About An Anonymous Tip Implicating Another Suspect.

As detailed above, during a summer, 2021 inspection of the Attorney General's case file, counsel for Mr. Atwood discovered a memorandum written by an FBI Special Agent on September 19, 1984 (i.e., two days after the disappearance, and before police had identified and arrested Mr. Atwood as a suspect) noting that the Phoenix Police Department had received an anonymous phone call from a woman who reported seeing Vicki Lynn Hoskinson in a vehicle with Arizona license plate 3AM618. This, of course, was not Mr. Atwood's car.

That alone would make the undisclosed information exculpatory, as it would have bolstered Mr. Atwood's insistence that he was not the one who had kidnapped the girl. But the report is exculpatory for a second important reason: it provides a direct connection between Annette Fries (and by extension, her son, Todd) to Vicki Lynne's disappearance. The connection between this tip and Fries is not speculative, because the license plate in question was, in fact, the license plate of Fries's next-door neighbor. It would strain credulity to suggest either that the neighbor of the alternate suspect, against

whom there was considerable evidence, was coincidentally driving with the victim in his car, or that an unrelated anonymous tipster randomly chose that license plate to report, or that Mr. Atwood had somehow coincidentally stolen and returned the car of the neighbor of the primary alternate suspect without his realizing it.

It is far more likely that Fries or her son called in the tip, and used a convenient known license plate number that was not theirs in an attempt to either exact revenge against a neighbor or throw police off their trail. Either motive for the false tip is consistent with Annette and Todd's demonstrated behavior. The exculpatory nature of this evidence is underscored by the fact that it occurred before Mr. Atwood was identified as a suspect and arrested—when the true killer would have been at greatest risk of exposure.

B. The Withheld Evidence Was Material.

Materiality does not require proof of a different outcome, or even a showing by a preponderance; it simply requires a reasonable probability. *Bagley,* 473 U.S. at 682. Here, the claim that Fries was the true killer is at the very core of Mr. Atwood's defense. This piece of evidence greatly bolsters that defense, for several reasons: first, given the use of Fries's neighbor's license plate number, it credibly links Fries to the investigation very early on in the case, in a way no other evidence had done. Fries (or her son) calling the police to report the victim traveling in someone else's car—the most reasonable interpretation of this evidence—is strongly suggestive of her involvement in the crime. Second, as a distinct and independent source of proof of Fries' involvement, this evidence significantly bolsters the voluminous other evidence pointing to her as the true

culprit. The numerous sightings placing Fries in the area of the disappearance, reports placing her with the victim on the evening of September 17, stories of her erratic behavior, and reports of other kidnapping attempts linkable to Fries come dramatically more powerful when there is other evidence suggesting that Fries herself was likely acting to cast suspicion on others. Third, this occurrence at the very beginning of the case creates an essential missing link between evidence later discovered about strikingly similar attempts to use false tips to foist police suspicious onto a third party. Indeed, Todd Fries has been proven to have committed the exact act suggested by the memo—calling police with a false tip meant to lead investigators to focus on suspects other than himself. Without this memo, such actions have no obvious connection to the Hoskinson disappearance, whereas having the memo reveals a highly similar M.O. to later actions, creating a strong link between the Frieses and this crime.

Because the State withheld evidence from Mr. Atwood that is both exculpatory and material, he did not receive a fair trial as required by the Fourteenth Amendment and *Brady v. Maryland.*

C. Timeliness

Under 28 U.S.C. § 2244(d)(1)(B), Mr. Atwood has one year from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." The Arizona Attorney General's Office permitted Mr. Atwood's counsel to inspect its case file less than one year ago, in the summer of 2021. Accordingly, this claim is timely.

CLAIM THREE: MR. ATWOOD IS ACTUALLY INNOCENT AND EXECUTING HIM WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. A. Mr. Atwood Satisfies the Ninth Circuit's Test for an Actual Innocence Claim.

In *Herrera v. Collins,* 506 U.S. 390 (1993), a majority of the Supreme Court assumed, without deciding, that execution of an innocent person would violate the Constitution, even without constitutional error at trial. The Ninth Circuit, recognizing that a majority of justices, spread across multiple opinions, believed it *would* violate the Constitution, has ruled that such a claim requires establishing not just doubt about guilt, but affirmative innocence. *Carriger v. Stewart,* 132 F.3d 463, 476 (9th Cir. 1997); *see also Jackson v. Calderon,* 211 F.3d 1148, 1164-65 (9th Cir. 2000) (rejecting state's argument that actual innocence is not a permissible ground for issuing a writ of habeas corpus); *United States v. Berry,* 624 F.3d 1031, 1038 n.5 (9th Cir. 2010) (recognizing existence in this circuit of freestanding actual innocence claim); *Turner v. Calderon,* 281 F.3d 851, 872 (9th Cir. 2002) (same). "The federal habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Jones v. Taylor*, 763 F.3d 1242, 1247 (9th Cir. 2014) (cleaned up).

The evidence presented here is not a mere attack on the reliability of the evidence presented at trial, nor does it simply raise doubts about the proof on one or more elements or identify a legal defect. It affirmatively demonstrates that someone else committed this

crime. That is precisely the showing required for relief from a conviction on grounds of actual innocence. *Carriger,* 123 F.3d at 476.

B. Timeliness

This claim is timely for the same reasons the first two are. Because it could not be brought until the State revealed the contents of its file, including the FBI tip memo that cemented the third-party culpability theory, the limitations period did not begin to run until the time of that file inspection. Alternatively, to the extend there is any limitations bar for this claim, it is subject to the equitable exception of *McQuiggin v. Perkins,* 569 U.S. 383, 393 (2013), based on the extensive showing of actual innocence put forth in this petition.

PRAYER FOR RELIEF

WHEREFORE, in consideration of the claims enumerated herein, Petitioner Frank Jarvis Atwood prays that this Court:

1. Issue a writ of habeas corpus to have him brought before it, to the end that he may be relieved of his unconstitutional sentence of death;
2. Allow Mr. Atwood leave to conduct discovery pursuant to Rule 6 of the Rules Governing 28 U.S.C. § 2254 Cases to more fully develop the factual bases demonstrating the constitutional infirmities in his conviction and sentence;

3. Conduct an evidentiary hearing pursuant to Rule 8 of the Rules Governing 28 U.S.C. § 2254 Cases; and

4. Grant such other relief as law and justice require.

Dated: May 4, 2022

Respectfully submitted,

/s/ *Amy P. Knight*
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